

HIGH COURT OF AUSTRALIA

KIEFEL CJ,
GAGELER, KEANE, GORDON, EDELMAN, STEWARD AND GLEESON JJ

FARM TRANSPARENCY INTERNATIONAL
LTD & ANOR

PLAINTIFFS

AND

STATE OF NEW SOUTH WALES

DEFENDANT

Farm Transparency International Ltd v New South Wales
[2022] HCA 23
Date of Hearing: 10 & 11 February 2022
Date of Judgment: 10 August 2022
S83/2021

ORDER

Questions 2 and 4 of the questions of law stated for the opinion of the Full Court in the amended special case filed on 6 October 2021 be amended, and the questions stated in the amended special case (as further amended) be answered as follows:

- 1. Does section 11 of the Surveillance Devices Act 2007 (NSW) impermissibly burden the implied freedom of political communication?*

Answer, "Section 11 does not impermissibly burden the implied freedom of political communication in its application to the communication or publication by a person of a record or report of the carrying on of a lawful activity, at least where the person was complicit in the record or report being obtained exclusively by breach of s 8 of the Surveillance Devices Act. It is unnecessary to determine whether s 11 burdens the implied freedom of political communication in other applications".

2. *If "yes" to Question 1, is s 11 of the Surveillance Devices Act 2007 (NSW) able to be partially disapplied in respect of its operation upon political communication pursuant to s 31(2) of the Interpretation Act 1987 (NSW)?*

Answer, "If s 11 were invalid in some of its operations, it could be partially disapplied to the extent of that invalidity. Otherwise, this question is unnecessary to answer".

3. *Does section 12 of the Surveillance Devices Act 2007 (NSW) impermissibly burden the implied freedom of political communication?*

Answer, "Section 12 does not impermissibly burden the implied freedom of political communication in its application to the possession by a person of a record of the carrying on of a lawful activity, at least where the person was complicit in the record being obtained exclusively by breach of s 8 of the Surveillance Devices Act. It is unnecessary to determine whether s 12 burdens the implied freedom of political communication in other applications".

4. *If "yes" to Question 3, is s 12 of the Surveillance Devices Act 2007 (NSW) able to be partially disapplied in respect of its operation upon political communication pursuant to s 31(2) of the Interpretation Act 1987 (NSW)?*

Answer, "If s 12 were invalid in some of its operations, it could be partially disapplied to the extent of that invalidity. Otherwise, this question is unnecessary to answer".

5. *Who should pay costs?*

Answer, "The plaintiffs should pay the defendant's costs".

Representation

P J Dunning QC with A Aleksov for the plaintiffs (instructed by Bleyer Lawyers Pty Ltd)

M G Sexton SC, Solicitor-General for the State of New South Wales, with M W R Adams for the defendant (instructed by Crown Solicitor's Office (NSW))

S P Donaghue QC, Solicitor-General of the Commonwealth, with T M Wood and J R Wang for the Attorney-General of the Commonwealth, intervening (instructed by Australian Government Solicitor)

J A Thomson SC, Solicitor-General for the State of Western Australia, with G M Mullins for the Attorney-General for the State of Western Australia, intervening (instructed by State Solicitor's Office (WA))

G A Thompson QC, Solicitor-General of the State of Queensland, with F J Nagorcka and K J E Blore for the Attorney-General of the State of Queensland, intervening (instructed by Crown Law (Qld))

M J Wait SC, Solicitor-General for the State of South Australia, with K M Scott for the Attorney-General for the State of South Australia, intervening (instructed by Crown Solicitor's Office (SA))

Notice: This copy of the Court's Reasons for Judgment is subject to formal revision prior to publication in the Commonwealth Law Reports.

CATCHWORDS

Farm Transparency International Ltd v New South Wales

Constitutional law (Cth) – Implied freedom of communication about governmental or political matters – Where s 8 of *Surveillance Devices Act 2007* (NSW) ("SD Act") relevantly prohibited knowing installation, use or maintenance of optical surveillance device on or within premises to record visually or observe carrying on of activity if installation, use or maintenance of device involved trespass – Where ss 11 and 12 of SD Act prohibited, respectively, publication or communication of record or report, and possession of record, obtained in contravention of, relevantly, s 8 of SD Act – Whether ss 11 and 12 burdened implied freedom – Whether provisions for legitimate purpose – Whether provisions suitable, necessary and adequate in balance.

Words and phrases – "adequate in its balance", "breach of confidence", "burden", "complicit in trespass", "implied freedom of political communication", "incremental burden", "lawful activity", "legitimate purpose", "mens rea", "optical surveillance device", "partially disapplied", "privacy", "public interest", "reasonably necessary", "structured proportionality", "suitable", "surveillance devices", "trespass".

Surveillance Devices Act 2007 (NSW), ss 8, 11, 12.

1 KIEFEL CJ AND KEANE J. The first plaintiff, Farm Transparency International Ltd, is a company and a not-for-profit charity which seeks to raise public awareness of animal cruelty and to increase an understanding of the importance of the prevention and alleviation of animal suffering. It seeks to improve the treatment of animals including through changes to the law, policy, practice and custom. In particular, the first plaintiff has agitated and advocated for political and legal changes to animal agricultural practices and animal welfare standards with the objective of ending modern farming and slaughtering practices. In doing so it has engaged in the publication of photographs, videos and audio-visual recordings of animal agricultural practices in Australia, including in New South Wales.

2 The second plaintiff, Christopher James Delforce, is a director of the first plaintiff and an activist for animal welfare and animal rights. The second plaintiff has participated in the entry onto the property of others to install, use or maintain an optical surveillance device to record the carrying out of an activity on the premises without the consent of the owner or occupier of the premises, which is to say the recordings were obtained through an act of trespass. The second plaintiff's affidavit, annexed to the Amended Special Case ("the ASC"), suggests that the premises were associated with the farming or slaughter of animals and that the recordings obtained were published by the plaintiffs.

3 At issue in the ASC is the validity of ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW) ("the SD Act"), which, subject to certain conditions and exceptions, respectively prohibit the publication of a record of the kind mentioned above, and the possession of such record, where it has been obtained in contravention of provisions of Pt 2 of the SD Act, which in turn would include the circumstances referred to above concerning the second plaintiff's conduct.

4 It is the plaintiffs' case that ss 11 and 12 effect a significant burden on the constitutionally guaranteed freedom¹ of persons to make known, to the public and to government, practices which involve cruelty to animals. It cannot be doubted that cruelty to animals is an important issue for society and for legislatures such as the New South Wales Parliament, and that persons and groups such as the plaintiffs have sought to achieve changes to laws directed to that issue. At the same time, there has been discussion about the rights of farmers, especially in relation to trespass on farms. The history of policy discussions and legislative actions in New South Wales² bears out the attention which has been directed to these topics. They

1 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

2 See, eg, *Farm Trespass: Action Plan for National Implementation of the NSW Farm Incursion Policy 2014* (2016); *Inclosed Lands, Crimes and Law Enforcement Legislation Amendment (Interference) Act 2016* (NSW); *Rural Crime Legislation*

are but one aspect of the broader implied freedom of communication on matters of politics and government.

- 5 The legislative purpose of the relevant provisions of the SD Act, which ss 11 and 12 further, is the protection of privacy. They pursue that purpose largely by preventing and deterring conduct which amounts to a trespass on the property of others. This is a legislative choice made by the New South Wales Parliament. The role of this Court is to determine whether, in the pursuit of that purpose, the freedom of political communication, understood more generally, has been impermissibly burdened or restricted. Such a conclusion might be reached where the means chosen to achieve what is, in law, a legitimate purpose, lacks proportionality. That engages the legal analysis required by this Court's decisions in *McCloy v New South Wales* and subsequent cases³.

The SD Act provisions

- 6 The SD Act came into force in New South Wales on 1 August 2008, following the repeal of the *Listening Devices Act 1984* (NSW). Its purpose is stated by s 2A to be:

"Objects of Act

The objects of this Act are –

- (a) to provide law enforcement agencies with a comprehensive framework for the use of surveillance devices in criminal investigations, and

Amendment Act 2017 (NSW); New South Wales, Department of Primary Industries, *Animal Welfare Action Plan* (2018); *Right to Farm Act 2019* (NSW); New South Wales, Legislative Council, Select Committee on Animal Cruelty Laws in New South Wales, *Inquiry into animal cruelty laws in New South Wales: Terms of Reference* (2020); New South Wales, Legislative Council, Select Committee on Animal Cruelty Laws in New South Wales, *Animal cruelty laws in New South Wales*, Report No 1 (2020); New South Wales, *Response to related recommendations arising out of the 2018 Parliamentary Inquiry into Landowner Protection from Unauthorised Filming or Surveillance* (2020).

- 3 *McCloy v New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards* (2019) 267 CLR 171; *Comcare v Banerji* (2019) 267 CLR 373; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490; 391 ALR 188.

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- (b) to enable law enforcement agencies to covertly gather evidence for the purposes of criminal prosecutions, and
- (c) to ensure that the privacy of individuals is not unnecessarily impinged upon by providing strict requirements around the installation, use and maintenance of surveillance devices."

7 The focus here is on s 2A(c) and the "privacy of individuals".

8 Part 2 of the SD Act, headed "Regulation of installation, use and maintenance of surveillance devices", creates a number of offences. Sections 7 to 10 concern the use of surveillance devices to record conversations, activities or information concerning a person. Sections 11 and 12 concern the publication and possession of records so obtained.

9 Section 7(1) of the SD Act prohibits the knowing installation, use or maintenance of a listening device to overhear, record, monitor or listen to a private conversation. It is subject to certain exceptions. A contravention of the section is an offence subject to a penalty.

10 Section 8(1) of the SD Act is most obviously relevant to the facts of the ASC. Section 8(1) provides that:

"A person must not knowingly install, use or maintain an optical surveillance device on or within premises or a vehicle or on any other object, to record visually or observe the carrying on of an activity if the installation, use or maintenance of the device involves –

- (a) entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier of the premises or vehicle, or
- (b) interference with the vehicle or other object without the express or implied consent of the person having lawful possession or lawful control of the vehicle or object.

Maximum penalty – 500 penalty units (in the case of a corporation) or 100 penalty units or 5 years imprisonment, or both (in any other case)."

11 An "optical surveillance device" is defined by s 4(1) to mean "any device capable of being used to record visually or observe an activity". Sub-section (2) of s 8 provides that sub-s (1) does not apply in certain circumstances not presently relevant.

12 Sections 9 and 10 contain prohibitions on the installation, use and maintenance of tracking devices and data surveillance devices respectively.

13 No challenge is brought by the plaintiffs to the validity of sections 7 to 10. The plaintiffs accept that they are valid laws. The sections the subject of challenge, ss 11 and 12, are in these terms:

"11 Prohibition on communication or publication of private conversations or recordings of activities

- (1) A person must not publish, or communicate to any person, a private conversation or a record of the carrying on of an activity, or a report of a private conversation or carrying on of an activity, that has come to the person's knowledge as a direct or indirect result of the use of a listening device, an optical surveillance device or a tracking device in contravention of a provision of this Part.

Maximum penalty – 500 penalty units (in the case of a corporation) or 100 penalty units or 5 years imprisonment, or both (in any other case).

- (2) Subsection (1) does not apply to the following –
- (a) if the communication or publication is made –
- (i) to a party to the private conversation or activity, or
 - (ii) with the consent, express or implied, of all the principal parties to the private conversation or activity, or
 - (iii) for the purpose of investigating or prosecuting an offence against this section, or
 - (iv) in the course of proceedings for an offence against this Act or the regulations,
- (b) if the communication or publication is no more than is reasonably necessary in connection with an imminent threat of –
- (i) serious violence to persons or of substantial damage to property, or
 - (ii) commission of a serious narcotics offence.

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- (3) A person who obtains knowledge of a private conversation or activity in a manner that does not involve a contravention of a provision of this Part is not prevented from communicating or publishing the knowledge so obtained even if the same knowledge was also obtained in a manner that contravened this Part.

12 Possession of record of private conversation or activity

- (1) A person must not possess a record of a private conversation or the carrying on of an activity knowing that it has been obtained, directly or indirectly, by the use of a listening device, optical surveillance device or tracking device in contravention of this Part.

Maximum penalty – 500 penalty units (in the case of a corporation) or 100 penalty units or 5 years imprisonment, or both (in any other case).

- (2) Subsection (1) does not apply where the record is in the possession of the person –
- (a) in connection with proceedings for an offence against this Act or the regulations, or
 - (b) with the consent, express or implied, of all of the principal parties to the private conversation or persons who took part in the activity, or
 - (c) as a consequence of a communication or publication of that record to that person in circumstances that do not constitute a contravention of this Part."

Questions in the Amended Special Case

- 14 It is not in dispute that the communication to others of an activity carried out on premises of the kind mentioned above may amount to a political communication which is the subject of the constitutionally protected implied freedom⁴. The freedom operates as a restriction upon legislative power⁵ and is the

4 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566-567.

5 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 554 [36]; *McCloy v New South Wales* (2015) 257 CLR 178 at 202-203 [30]; *Brown v Tasmania* (2017) 261

basis of the plaintiffs' challenge to the constitutional validity of ss 11 and 12 of the SD Act.

15 The plaintiffs and the defendant have agreed that the following questions be referred to a full bench of this Court for determination:

1. Does section 11 of the SD Act impermissibly burden the implied freedom of political communication?
2. If "yes" to Question 1, is section 11 of the SD Act severable in respect of its operation upon political communication pursuant to s 31(2) of the *Interpretation Act 1987* (NSW)?
3. Does section 12 of the SD Act impermissibly burden the implied freedom of political communication?
4. If "yes" to Question 3, is section 12 of the SD Act severable in respect of its operation upon political communication pursuant to s 31(2) of the *Interpretation Act 1987* (NSW)?
5. Who should pay costs?

The limits of the Amended Special Case

16 The facts stated in the ASC are that the first plaintiff has engaged in conduct that purportedly contravenes ss 11 and 12 of the SD Act and may in the future engage in such conduct. Likewise, the second plaintiff has in the past and may in the future engage in conduct that purportedly contravenes ss 11 and 12.

17 The conduct engaged in or to be engaged in is not specified in the ASC. Only the second plaintiff identifies conduct by him as having purportedly contravened s 8 of the SD Act. He may therefore be taken to have entered onto premises without the consent of the owner or occupier to knowingly install, use or maintain an optical surveillance device to record the carrying on of an activity on the premises. The ASC does not contain any facts which point to either of the plaintiffs' conduct as having involved s 7, s 9 or s 10.

18 In a passage in an affidavit relied on by the plaintiffs, it is said that if the first plaintiff receives information in the future, "whether video footage or audio recordings or otherwise", which depicts animal cruelty, it would "wish to publish that information". This takes the matter no further for the plaintiffs. It is not

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sufficient to establish a state of facts relevant to the engagement of s 7 of the SD Act. It is not suggested that the first plaintiff has ever published private conversations recorded by listening devices contrary to s 7.

19 The plaintiffs' submissions proceed upon the basis that they are entitled to challenge ss 11 and 12 in all their operations respecting ss 7 to 10. Such an entitlement does not follow from the concession by the defendant that the plaintiffs have standing. The existence of standing does not mean that the plaintiffs can "roam at large" over the statutory provisions⁶.

20 As recently restated in *Mineralogy Pty Ltd v Western Australia*⁷, this Court takes a "cautious and restrained" approach to answering questions concerning the constitutional validity of provisions. The parties to a special case have no entitlement to expect an answer on a question of law stated in that special case unless the Full Court can be satisfied that "there exists a state of facts which makes it necessary to decide [the] question in order to do justice in the given case and to determine the rights of the parties"⁸.

21 The plaintiffs are entitled to advance only those grounds of challenge which bear on the validity of ss 11 and 12 in their application to the plaintiffs⁹. At the most, it may be said that the conduct of the second plaintiff is of a kind to which s 8 refers. The plaintiffs are then properly confined to challenging the validity of ss 11 and 12 as engaged by s 8. The relevant parts of ss 11 and 12 that are engaged are those which prohibit the publication and possession of a record of the carrying on of an activity obtained in contravention of s 8.

The mental elements of s 11

22 A difference may be observed in the statement of the offences under ss 11 and 12 concerning the element of knowledge of a contravention of Pt 2. In s 12 it is an element of the offence, which must therefore be proved, that the possessor of

6 *Knight v Victoria* (2017) 261 CLR 306 at 324-325 [33]; *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 847 [59]; 393 ALR 551 at 566.

7 (2021) 95 ALJR 832 at 846 [57]; 393 ALR 551 at 565.

8 *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 846 [56]; 393 ALR 551 at 565, quoting *Lambert v Weichelt* (1954) 28 ALJ 282 at 283. See also *Duncan v New South Wales* (2015) 255 CLR 388 at 410 [52]; *Knight v Victoria* (2017) 261 CLR 306 at 324 [32]; *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432 at 437 [21]; 389 ALR 363 at 368; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 511 [90]; 391 ALR 188 at 210.

9 *Knight v Victoria* (2017) 261 CLR 306 at 325 [33].

the record of the carrying on of an activity knows that the record has been obtained by the use of an optical surveillance device in contravention of Pt 2. Section 11 speaks only of a person's knowledge as an awareness of a record of an activity which is brought about by the use of a surveillance device in contravention of Pt 2, rather than an awareness of that contravention.

23 In their original submissions the plaintiffs drew attention to the absence of any express reference in s 11 to the person publishing the record having knowledge that it was obtained in contravention of Pt 2. This led them to submit that the offence was one of strict liability which arose whenever a provision of Pt 2 was contravened, without more. On this understanding the operation of s 11 would be broad. This is not a position which they continue to maintain in the face of authority.

24 It is well settled that mens rea, or a knowledge of the wrongfulness of an act, is an essential element in every statutory offence unless it is expressly or by necessary implication excluded by the statute¹⁰. The law makes two presumptions which are implied as elements in a statutory offence. The first is that the person does the physical act defined in the offence voluntarily and with the intention of doing the act. The second, which is here relevant, relates to the external elements of a statutory offence, being the circumstances which attend the doing of the physical act. The law implies as an element of the offence that at the time when the person does the physical act involved, they know the circumstance which makes the doing of that act an offence or do not believe honestly and on reasonable grounds that the circumstances are such as to make the doing of the act innocent¹¹.

25 Since there are no express words or any implications to prevent the presumption applying to s 11, it is taken to be an element of the offence there stated that the person publishing the record must have known that s 8 has been contravened in making the record, or was reckless as to that fact. No offence is committed unless a person is shown to have that state of mind. This will be relevant in determining the extent to which the SD Act operates to burden the implied freedom.

A burden on the implied freedom of political communication

26 The free flow of communication on matters of politics and government is implied in the *Constitution* as necessary to the maintenance of the system of

10 *Sherras v De Rutzen* [1895] 1 QB 918 at 921, cited in *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 528 per Gibbs CJ, 549 per Wilson J, 566 per Brennan J.

11 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 570-571, 582 per Brennan J.

government for which the *Constitution* provides¹². It is of such importance that a statutory provision which has the effect of burdening it, by restricting or limiting such communication, must be justified¹³. It is sufficient for a law to require justification that it effects any burden on the freedom. The extent of that burden assumes importance in the later process of justification.

27 The question whether the freedom is burdened has regard to the legal and practical operation of the law¹⁴. The question is not how it may operate in specific cases, which are but illustrations of its operation, but how the statutory provision affects the freedom more generally¹⁵.

28 The defendant properly concedes that, in their operation, ss 11 and 12 may burden the implied freedom. Communications about activities carried out on premises may be political in nature and the provisions prohibit those communications, or the possession of information about those activities for the purposes of those communications. Such communications may include discussions of animal welfare, a legitimate matter of governmental and political concern¹⁶ and a matter in respect of which persons may seek to influence government. That is not to say that ss 11 and 12, as engaged by s 8, are directed to the content of what is published. They are not. They are relevantly directed more generally to records of activities which are obtained by unlawful means using optical surveillance devices.

29 The process of justification commences with the identification of the statutory purpose. That purpose must be compatible with the system of representative government for the provision to be valid¹⁷. A justification for a

12 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 551 [27]; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 504 [44]; 391 ALR 188 at 199.

13 *McCloy v New South Wales* (2015) 257 CLR 178 at 213 [68]; *Brown v Tasmania* (2017) 261 CLR 328 at 369 [127]; *Comcare v Banerji* (2019) 267 CLR 373 at 399 [29]; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 504 [45]; 391 ALR 188 at 199.

14 *Brown v Tasmania* (2017) 261 CLR 328 at 358 [84], 367 [118], 431 [316], 433-434 [326], 479-481 [484]-[488].

15 *Brown v Tasmania* (2017) 261 CLR 328 at 360 [90].

16 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 286-287 [217] per Kirby J.

17 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567; *McCloy v New South Wales* (2015) 257 CLR 178 at 203 [31]; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 504 [45]; 391 ALR 188 at 199-200.

burden will only be sufficient if it is shown that the statutory provision is proportionate to the achievement of its purpose¹⁸. Since *McCloy v New South Wales*¹⁹, including more recently in *LibertyWorks Inc v The Commonwealth*²⁰, proportionality has been assessed by reference to whether the impugned provision is suitable, necessary and adequate in its balance²¹.

Legitimacy of purpose

30 The plaintiffs accept that the purposes stated in s 2A are legitimate. The purposes stated in s 2A of the SD Act extend beyond those relevant to law enforcement agencies, which may use surveillance devices in criminal investigations and to gather evidence for prosecutions. Section 2A(c) states an object of the SD Act to be to ensure that the privacy of individuals is not unnecessarily impinged upon and it says that it seeks to achieve that purpose by providing strict requirements around the installation, use and maintenance of surveillance devices. Sections 7 to 10 may be understood to be those strict requirements.

31 Section 8 prohibits the installation, use or maintenance of an optical surveillance device to record the carrying on of an activity on premises (or in a vehicle) where the installation, use or maintenance of the device involves entry onto premises constituting a trespass. Although privacy may generally be understood to be concerned with personal autonomy²², it may also take its meaning from statutory context. Section 8 may be understood to protect the interest in privacy which arises out of the enjoyment of private property²³. It adopts the policy

18 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 562; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 504 [46]; 391 ALR 188 at 200.

19 (2015) 257 CLR 178.

20 (2021) 95 ALJR 490 at 504 [46] per Kiefel CJ, Keane and Gleeson JJ; 391 ALR 188 at 200.

21 *Brown v Tasmania* (2017) 261 CLR 328 at 368 [123] per Kiefel CJ, Bell and Keane JJ, 416-417 [278] per Nettle J; *Clubb v Edwards* (2019) 267 CLR 171 at 200-202 [70]-[74] per Kiefel CJ, Bell and Keane JJ, 264-265 [266] per Nettle J, 311 [408], 330-331 [463] per Edelman J; *Comcare v Banerji* (2019) 267 CLR 373 at 400 [32] per Kiefel CJ, Bell, Keane and Nettle JJ.

22 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 256 [125] per Gummow and Hayne JJ.

23 *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at 344-345 [52].

of the common law and furthers the protections afforded by the law of trespass to prohibit optical surveillance being conducted on private property. It seeks to prevent interference with "the possession of property and the privacy and security of its occupier"²⁴. So understood, the purpose of s 8 is to protect privacy and the incidents of the possession of property as relevant to it. It does so by making conduct enabled by trespass an offence and thereby discouraging it.

32 The publication of an optical surveillance record of activities conducted on premises might further erode the privacy interests of those having possession of the property. Sections 11 and 12 are intended to limit the damage to those interests caused by the publication of material obtained in contravention of s 8. Section 11, to which s 12 is largely preparatory, may be understood to further those purposes. Its prohibitions on publication are intended not only to deter the publication of a record unlawfully obtained but also to deter a contravention of s 8 and lessen the likelihood of it occurring. It may be seen to have that purpose because it seeks to prevent the use of the product of the initial unlawful act.

33 Sections 11 and 12 have proper purposes as laws. They do not impede the functioning of representative government and what that entails²⁵ and are therefore legitimate in the sense relevant to the implied freedom.

34 The plaintiffs submit that a purpose of ss 11 and 12 is to effect a "gag" on discussions about the agricultural practices with which the plaintiffs are concerned. It is correct to observe, as is stated in the ASC, that the expression "farm trespass" has been adopted by the New South Wales Government in recent years to describe a range of conduct that includes persons entering farming properties without consent for the purposes of advocacy and protest. As the ASC records, Select Committees of the New South Wales Parliament have considered the effects of trespass and unauthorised surveillance devices on farmers and farming operations; have considered issues around the effectiveness of animal cruelty laws; and have made recommendations concerning legislative changes. None of these reports are relevant to the SD Act as enacted and its purpose. The plaintiffs' submissions essentially fail to distinguish between an effect of an impugned provision and statutory purpose²⁶. It may be that a consequence of ss 11 and 12 is that some reporting of agricultural practices is prevented, at least in cases where the publisher

24 *Plenty v Dillon* (1991) 171 CLR 635 at 647.

25 *McCloy v New South Wales* (2015) 257 CLR 178 at 203 [31]; *Clubb v Edwards* (2019) 267 CLR 171 at 194 [44].

26 *McCloy v New South Wales* (2015) 257 CLR 178 at 205 [40]; *Brown v Tasmania* (2017) 261 CLR 328 at 362 [100].

knows of the antecedent trespassory conduct, but that effect cannot be equated with their statutory purpose.

Suitability

- 35 The requirement of suitability is not in issue in the present case. There is no dispute that the measures provided for in ss 11 and 12 are rationally connected to the purposes which they seek to achieve²⁷.

The burden and its extent

- 36 It has been mentioned earlier in these reasons that the extent to which ss 11 and 12 of the SD Act burden the freedom assumes importance in the process of justifying the law. The extent of the burden is relevant in considering the alternative measures which may be employed to achieve the same statutory purpose, and which may be less burdensome in effect. It is also relevant in considering adequacy of balance, where consideration is given to the extent of the burden and the importance of the statutory purpose.

- 37 The extent of the burden effected by ss 11 and 12 is not to be assessed by reference to the operation and effect of those provisions alone. The burden effected by the prohibitions in ss 11 and 12 must be assessed by reference to the restraints which the law – understood as the common law, equity, and statute law – already imposes upon a person's ability to publish records of activities obtained surreptitiously and by conduct which amounts to trespass. The relevant burden is the incremental effect of the impugned law on the ability of a person to engage in a communication which the law may already validly restrict²⁸. It is that burden which is to be justified.

- 38 Consideration may first be given to what rights the common law and equity recognise, and which may be enforced to prevent publication of information obtained in the manner mentioned. The question of what causes of action might be applied to invasions of privacy was discussed in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*²⁹. At issue in that case was whether an interlocutory injunction could issue with respect to the publication by the appellant

27 See *Comcare v Banerji* (2019) 267 CLR 373 at 400 [33].

28 *Levy v Victoria* (1997) 189 CLR 579 at 625-626 per McHugh J; *Brown v Tasmania* (2017) 261 CLR 328 at 365 [109] per Kiefel CJ, Bell and Keane JJ, 383 [181], 385-386 [188] per Gageler J, 408-409 [259] per Nettle J, 443 [357], 455 [393], 460 [411], 462 [420] per Gordon J, 502-503 [557]-[558], 507 [566] per Edelman J.

29 (2001) 208 CLR 199.

of film footage it had received showing the method by which possums were killed at a licensed abattoir, in circumstances where the footage had been obtained using hidden video cameras installed by unidentified trespassers.

39 As Gummow and Hayne JJ observed³⁰, the common law of Australia has not yet recognised a general right to privacy. The recognised causes of action to which their Honours referred³¹ as possibly having application in such circumstances included those for injurious falsehood, defamation (where truth was not a complete defence) and confidential information which concerned the personal affairs and private life of a person.

40 So far as concerns the law of breach of confidence, Gleeson CJ observed³² that equity may impose obligations of confidentiality even though there is no imparting of information in circumstances of trust and confidence. Equity, acting on the principle of good faith, will restrain the publication of information which may be regarded as confidential and which was improperly or surreptitiously obtained. A photographic image or a film depicting activities that are private in nature, which were recorded by the methods employed in that case, would be protected³³. A difficulty for the respondent in that case was that the activities secretly observed and filmed were not private in nature. His Honour observed that "a person who enters without permission is a trespasser; but that does not mean that every activity observed by the trespasser is private"³⁴.

41 Prior to the decision in *Lenah Game Meats*, in *Lincoln Hunt Australia Pty Ltd v Willesee*³⁵, Young J expressed the view that even where no confidentiality was involved, a court might intervene to restrain publication of a videotape or photograph taken by a trespasser where the circumstances were such as to make it

30 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 250 [110]; see also *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502; 376 ALR 575.

31 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 255 [123].

32 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 224 [34].

33 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 224 [34], 225 [39].

34 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 227 [43].

35 (1986) 4 NSWLR 457 at 463.

unconscionable. As noted in *Smethurst v Commissioner of the Australian Federal Police*³⁶, little support for that view can be derived from the judgments in *Lenah Game Meats*. Gummow and Hayne JJ considered that the notion of unconscionable behaviour does not operate at large³⁷. Gleeson CJ concluded³⁸ that the fact that the information was obtained tortiously, by trespass, was not sufficient to make it unconscientious for a person into whose hands that information later comes to use or publish it.

42 The respondent in *Lenah Game Meats* was unable to identify a legal or equitable right which could be pursued at trial and which would warrant the grant of an interlocutory injunction. The law of trespass could not avail it. It provides for a right to damages but not one to prevent the use of information obtained as a result of the trespass.

43 It may be that the law of defamation will provide a basis in some cases to prevent the publication of defamatory matter contained in records of activities made by surveillance devices, subject to available defences. There may well be some cases where the law of confidential information will protect private activities filmed surreptitiously from publication, but much may depend on what activities qualify as "private", as *Lenah Game Meats* shows. It may be concluded that the common law and equity may be effective to prevent some, but certainly not all, publications.

44 More to the point in the present case is s 8 of the SD Act, a law the validity of which is not challenged. An assessment of the burden effected by ss 11 and 12 must take as its starting point that the law prohibits the making of a record of activities on premises by the use of an optical surveillance device where a trespass is committed in doing so, and that the law imposes a substantial penalty for a contravention of that prohibition. On the other hand, s 8 will not be contravened if a person who is lawfully on the premises, for example an employee, makes a recording.

45 If the prohibition in s 8 is obeyed, there should be no persons who would become subject to the prohibitions of ss 11 and 12. It is to be assumed that most

36 (2020) 94 ALJR 502 at 525 [82]; 376 ALR 575 at 595; see also (2020) 94 ALJR 502 at 558 [242]-[244]; 376 ALR 575 at 638-639.

37 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 244-245 [98], Gaudron J agreeing at 231 [58].

38 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 231 [55].

citizens will be obedient to the law³⁹. Nevertheless, ss 11 and 12 add another level of prohibition directed to the communication of a record of activity obtained in breach of s 8. Importantly though, the prohibition applies only where there is conduct constituting a contravention of s 8, which includes trespassory conduct, and where the person publishing the record has knowledge of the circumstances which constitute the offence under s 8. All that is effectively burdened by ss 11 and 12 is the communication of information obtained through specified unlawful means to the knowledge of the person communicating that information. These are significant limitations on the extent of the burden.

Necessity

46 The test of reasonable necessity looks to whether there is an alternative measure available which is equally practicable when regard is had to the purpose pursued, and which is less restrictive of the freedom than the impugned provision⁴⁰. The alternative measure must be obvious and compelling⁴¹. The mere existence of another measure capable of achieving the same purpose will not be sufficient for a conclusion of lack of justification. The other measure must be equally practicable. To be equally practicable as the impugned provision, the alternative must achieve the same legislative purpose to the same degree, which is to say it must be possible to conclude that the alternative legislative measure is equally as effective⁴². Where there is a measure which has these qualities, the impugned

39 *Potter v Minahan* (1908) 7 CLR 277 at 304-305.

40 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 568; *Unions NSW v New South Wales* (2013) 252 CLR 530 at 556 [44]; *McCloy v New South Wales* (2015) 257 CLR 178 at 210 [57], 217 [81]; *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139]; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 509 [78]; 391 ALR 188 at 207.

41 *Monis v The Queen* (2013) 249 CLR 92 at 214 [347]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 550 [36]; *McCloy v New South Wales* (2015) 257 CLR 178 at 210-211 [57]-[58]; *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139]; *Clubb v Edwards* (2019) 267 CLR 171 at 186 [6], 262 [263], 265 [266(3)], 265-266 [267]-[268], 269 [277], 337-338 [478]-[480]; *Comcare v Banerji* (2019) 267 CLR 373 at 401 [35]; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 509 [78]; 391 ALR 188 at 207.

42 *Tajjour v New South Wales* (2014) 254 CLR 508 at 571 [113]-[114]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 614-615 [41]; *Clubb v Edwards* (2019) 267 CLR 171 at 336-337 [477].

legislative provision cannot be said to be necessary, in the sense that its choice is rational and therefore justified.

47 The plaintiffs refer, as alternative measures, to the provisions of: the *Surveillance Devices Act 1999* (Vic) ("the Victorian Act"); the *Surveillance Devices Act 2016* (SA) ("the SA Act"); the *Invasion of Privacy Act 1971* (Qld) ("the Queensland Act"); the *Surveillance Devices Act 1998* (WA) ("the WA Act"); and the *Surveillance Devices Act 2007* (NT) ("the NT Act"). The Queensland Act may be put to one side. It does not seek to regulate optical surveillance devices and records taken using them. The plaintiffs rely principally upon the Victorian Act and the provision it makes⁴³, by way of exception to its prohibitions on knowingly publishing a record of a private activity obtained by use of a surveillance device, for the publication of such a record in the public interest. A similar exception is to be found in the NT Act.

48 Each of the four relevant statutes referred to concerns the recording by a surveillance device, relevantly an optical surveillance device, of a "private activity". The Victorian Act⁴⁴ prohibits the knowing installation, use or maintenance by a person of an optical surveillance device to record a "private activity" to which the person is not a party. A "private activity" is defined⁴⁵ to be "an activity carried on in circumstances that may reasonably be taken to indicate that the parties to it desire it to be observed only by themselves", with certain exceptions. The Victorian Act also provides, by s 11(1), that, subject to sub-s (2), "a person must not knowingly communicate or publish a record or report of a private conversation or private activity that has been made as a direct or indirect result of the use of ... an optical surveillance device". By sub-s (2)(b)(i), sub-s (1) does not apply to a communication or publication that is no more than is reasonably necessary "in the public interest".

49 The NT Act also creates offences regarding: the installation of an optical surveillance device to monitor a "private activity"⁴⁶, which is defined in terms similar to the Victorian Act⁴⁷; and the communication or publication of a record of a private activity, where the publisher knows it has been made as a direct or indirect

43 s 11(2)(b)(i).

44 s 7.

45 s 3(1).

46 s 12(1).

47 See Victorian Act, s 3(1) (definition of "private activity"); NT Act, s 4 (definition of "private activity").

result of the use of an optical surveillance device⁴⁸. The NT Act permits the communication or publication of a record if it is reasonably necessary in the public interest⁴⁹. The SA Act and the WA Act contain similar offences relating to the use of optical surveillance devices and the publication of records of a private activity, but the question as to whether the latter is in the public interest is a matter for a judge⁵⁰.

50 The Victorian Act and the other statutes apply more broadly in the first instance than the SD Act. As earlier explained, the burden effected by ss 11 and 12 of the SD Act is significantly limited because they apply only where trespassory conduct has taken place and the publisher or possessor knows of such conduct. The Victorian and other mentioned State and Territory statutes, by contrast, apply their prohibitions to any publication of a record of a private activity made by an optical surveillance device. That is to say, the prohibition applies to the publication of a record howsoever obtained, whether lawfully or unlawfully. This casts doubt upon whether they truly effect a lesser burden on the freedom, at least in the first instance.

51 The public interest exception may not ameliorate the burden which the other statutes effect to the extent for which the plaintiffs contend. The exception will only apply where it is shown that the dissemination of information about what is a private activity is truly in the public interest. This cannot be assumed to be an easy task. The plaintiffs may consider that in their area of concern it is more likely to be established, but the question of the burden effected on the freedom by statute is to be assessed more generally, by reference to its effect as a whole⁵¹.

52 It may be accepted that, generally speaking, the other statutory schemes pursue the purpose of protection of privacy. But the privacy interest to which they refer differs from the SD Act. The Victorian and other statutes are based upon a conception of privacy viewed from the perspective of the parties to a private activity and their personal interests. The SD Act seeks to protect privacy interests in activities conducted on premises as an aspect of a person's possessory rights over their property. It may therefore be concluded that the Victorian and other statutes do not pursue the same purpose when regard is had to the interests that they seek to protect.

48 NT Act, s 15(1).

49 s 15(2)(b)(i).

50 SA Act, ss 10 and 11; WA Act, s 31.

51 *Brown v Tasmania* (2017) 261 CLR 328 at 360 [90].

53 It may also be accepted that a purpose of s 8 of the SD Act is to prevent or deter trespassory conduct. Sections 11 and 12 further that purpose. To make those provisions subject to a public interest exception would be inconsistent with the achievement of that purpose, since the exception is likely to have the effect of encouraging persons to unlawfully enter agricultural land to conduct surveillance of activities on it. The observation of a cross-agency working group of the New South Wales Government, in not recommending that a public interest exception be made to the SD Act⁵², was plainly correct.

54 Moreover, it may be concluded by reference to ss 8, 11 and 12 that the New South Wales Parliament has largely decided where the public interest lies. It has chosen a scheme of regulation of optical surveillance devices where trespassory conduct is discouraged. It is to be inferred that it is the New South Wales Parliament's view that such conduct lies at the heart of the problems associated with the use of surveillance devices and their intrusion into privacy. A public interest exception to publication would fundamentally alter that scheme. It is not possible to conclude that it would operate in the same way or meet its objective. It cannot be said that such a measure would make the SD Act equally efficacious in the protections it seeks to provide.

Adequacy of balance

55 If, as here, a law presents as suitable and necessary, it is to be regarded as adequate in its balance unless the benefit sought to be achieved by the law is manifestly outweighed by its adverse effect on the implied freedom⁵³.

56 The protection of privacy interests has long been recognised as a social value which is protected by the tort of trespass⁵⁴. Its importance is obvious. The burden effected by ss 11 and 12 of the SD Act on the freedom, in the pursuit of that purpose, cannot be said to be great. It is significantly limited by the prohibitions affecting only those communications made by persons who know that the records of activities they publish have been obtained by unlawful acts of trespass.

52 New South Wales, *Response to related recommendations arising out of the 2018 Parliamentary Inquiry into Landowner Protection from Unauthorised Filming or Surveillance* (2020) at 11.

53 *Comcare v Banerji* (2019) 267 CLR 373 at 402 [38]; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 510 [85]; 391 ALR 188 at 209.

54 *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at 344-345 [52].

Answers

57 The plaintiffs' challenge to the validity of ss 11 and 12 of the SD Act fails. We would propose that the following answers be given:

1. No.
2. Not necessary to answer.
3. No.
4. Not necessary to answer.
5. The plaintiffs should pay the defendant's costs.

58 The answers we propose to questions one and three are based upon a broader view of the valid operation of ss 11 and 12 of the SD Act than that taken by Edelman J (with whom Steward J agrees). Because we take that broader view, we are able to agree with his Honour that the sections do not impermissibly burden the implied freedom of political communication in its application to the communication or publication by a person of a record or report of the carrying on of a lawful activity, *at least* where the person was complicit in the record or report being obtained exclusively by breach of s 8 of the SD Act. On that basis, it would not be necessary to determine whether ss 11 and 12 burden the implied freedom in other applications. We also agree with the answers proposed by Edelman J with respect to questions two and four, as reformulated by his Honour, and question five.

59 GAGELER J. An account of the facts set out in the special case is given by Kiefel CJ and Keane J. Without repeating their Honours' account, I will need to supplement it in one matter of detail.

60 For the reasons given by Kiefel CJ and Keane J, as well as by Gordon J, the question of law ripe for judicial determination on the facts set out in the special case is whether the prohibitions on the publication and possession of a visual record in ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW) infringe the constitutionally implied freedom of political communication in their application to a visual record that has resulted from a contravention of s 8.

61 Farm Transparency International Ltd is shown by the special case to have been complicit in a contravention of s 8 engaged in by Mr Delforce in the past. That fact does not, in my opinion, confine the question for judicial determination more narrowly.

62 Farm Transparency is described in the special case as having been established as a not-for-profit charity for purposes which include preventing and relieving the suffering of animals by raising public awareness of animal cruelty. It is described as having a practice of engaging in activities which include the publication of visual records of animal agricultural practices in New South Wales. An affidavit forming part of the special case deposes that all of its activities "are based on the photographic and audio-visual material it has taken, organised, received or obtained". The affidavit deposes that the photographic and audio-visual material Farm Transparency takes, organises, receives or obtains records animal agriculture practices of a kind that of their nature are never recorded voluntarily or with the consent of the proprietor of the agricultural business. The affidavit concludes by deposing that "[i]n the future, if [Farm Transparency] receives information, whether video footage or audio recordings or otherwise, that shows animal cruelty practices in New South Wales, [Farm Transparency] would wish to publish that information".

63 Farm Transparency undoubtedly desires, and intends, to do that which it has done in the past and asks this Court to declare that it can lawfully do in the future: to publish and possess visual records of animal agricultural practices in New South Wales created by others in contravention of s 8. To the extent that it seeks declarations to that effect, its claim for relief is not hypothetical in a sense that is relevant to the exercise of jurisdiction⁵⁵. Unless it is to be denied relief by reason of its past complicity in a contravention of s 8, it is entitled to an adjudication of the totality of its claim that the purported constraints imposed by ss 11 and 12 on its freedom to publish and possess visual records that have resulted

55 See *The Commonwealth v Sterling Nicholas Duty Free Pty Ltd* (1972) 126 CLR 297 at 305.

from contraventions of s 8 infringe the constitutionally implied freedom of political communication⁵⁶.

64 The construction and legal operation of ss 11 and 12 are also explained by Kiefel CJ and Keane J, as well as by Gordon J. To the extent that their explanations of the elements of the offences created by those sections differ, I do not take a position. Enough for me is to note that neither offence is committed without knowledge that the visual record published or possessed was created by use of an optical surveillance device in circumstances of a trespass to private property criminally prohibited by s 8.

65 Features of the legislative scheme which I consider to be of constitutional significance are the following. The legislative purpose is not exhausted by the object stated in s 2A(c). The broader purpose of s 8 is to protect the privacy of all activities that occur on private property. The prohibitions in ss 11 and 12 enhance the operation of s 8 by disincentivising breach of s 8 in accordance with what has elsewhere been described as "[t]he 'dry-up-the-market' theory, which posits that it is possible to deter an illegal act that is difficult to police by preventing the wrongdoer from enjoying the fruits of the crime"⁵⁷. Exceptions in ss 11(3) and 12(2)(c) mean that neither prohibition applies to a visual record already in the public domain.

66 Having noted those features of the legislative scheme at the outset, I am able to come immediately to the constitutional issue at the heart of the matter. The issue is whether it is compatible with the maintenance of the constitutionally prescribed system of government, for the purpose of protecting the privacy of activities on private property, to impose blanket prohibitions on the possession and communication of a visual record known to have been created as a result of a trespass to private property and not otherwise in the public domain.

67 Implicit in that framing of the issue is rejection of any notion that the purpose of disincentivising contravention of a criminal prohibition can alone be a purpose capable of justifying a law that imposes a burden on freedom of political communication⁵⁸. To accept such a notion would be to conflate the purpose of a

56 See *Croome v Tasmania* (1997) 191 CLR 119 at 125-127, quoting *Toowoomba Foundry Pty Ltd v The Commonwealth* (1945) 71 CLR 545 at 570 and *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403 at 433.

57 *Bartnicki v Vopper* (2001) 532 US 514 at 550.

58 Compare *Bartnicki v Vopper* (2001) 532 US 514 at 529-530, quoted in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 228-229 [48]. See also, in the Ch III context, *Minister for Home Affairs v Benbrika* (2021) 95 ALJR 166 at 192 [85]; 388 ALR 1 at 28.

law – the "public interest sought to be protected and enhanced" by the law⁵⁹ – with the means adopted by the law to achieve that purpose. The consequence would be to allow a legislative scheme to be designed to bootstrap itself into constitutional validity.

68 The criminal prohibitions in ss 11 and 12 on communication and possession of a visual record, and the criminal prohibition in s 8 of the means of creation of a visual record, are complementary components of a single legislative scheme. By that legislative scheme, the privacy of activities on private property is sought to be protected. To the extent that the legislative scheme prohibits communication or possession of an extant visual record of the carrying on of an activity that is of governmental or political concern, it burdens freedom of political communication. That burden falls to be justified, if at all, by reference to the underlying legislative purpose of protecting the privacy of activities on private property.

69 For reasons to be developed, I consider that the burden on freedom of political communication imposed by the blanket criminal prohibitions in ss 11 and 12, in their application to a visual record that has resulted from the use of an optical surveillance device in contravention of s 8, is unjustified. The result is that I consider each of the prohibitions, in that application, to infringe the constitutional guarantee of freedom of political communication.

The significance of *Lange*

70 The interest of an owner or occupier in the privacy of activities that occur on private property has long been an interest which the law has afforded a measure of protection⁶⁰.

71 Pursuit of the protection of that interest is doubtless compatible with the constitutionally prescribed system of government which the constitutional guarantee of freedom of political communication exists to protect. But even where it can be accepted without question that a law burdening freedom of political communication does so in pursuit of a purpose that is compatible with the constitutionally prescribed system of government, it cannot simply be accepted without question that the same law pursues that purpose in a manner that is compatible with the constitutionally prescribed system.

59 *Cunliffe v The Commonwealth* (1994) 182 CLR 272 at 300.

60 *Plenty v Dillon* (1991) 171 CLR 635 at 647; *TCN Channel Nine Pty Ltd v Anning* (2002) 54 NSWLR 333 at 344-345 [52], 346 [58]; *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 533-534 [124]; 376 ALR 575 at 606.

72 To the contrary, as I have explained in the past⁶¹:

"The implied constitutional freedom is a constraint on legislative design. It limits legislative options. The consequence of the implied constitutional freedom is that there are some legitimate ends which cannot be pursued by some means, the result of which in some circumstances is that some ends will not be able to be pursued to the same extent as they might have been pursued absent the implied constitutional freedom. Means which come at too great a cost to the system of representative and responsible government established by the *Constitution* must be abandoned or refined. Means which are overbroad may need to be narrowed."

73 Appreciating the impact of the implied constitutional freedom on the measure of protection that can be afforded by law to the privacy of activities that occur on private property is assisted by examining what *Lange v Australian Broadcasting Corporation*⁶² held to be the impact of the implied constitutional freedom on the measure of protection that can be afforded by law to personal reputation. For the application of constitutional principle to be consistent, the impacts must be coherent.

74 In *Lange*, the implied constitutional freedom was held to necessitate adjustment of the balance until then struck in the law of defamation between protection of personal reputation and freedom of speech. The adjustment involved extending the common law defence of qualified privilege to recognise that "each member of the Australian community has an interest in disseminating and receiving information, opinions and arguments concerning government and political matters that affect the people of Australia"⁶³.

75 The precept of *Lange* is that freedom of communication to and between electors, and between electors and elected legislative and executive representatives, on matters of government and politics is an "indispensable incident" of the system of representative and responsible government prescribed by the *Constitution*⁶⁴. Within the scope of the freedom is communication of

61 *Tajjour v New South Wales* (2014) 254 CLR 508 at 584 [163].

62 (1997) 189 CLR 520.

63 (1997) 189 CLR 520 at 571.

64 (1997) 189 CLR 520 at 559-560. See also *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 555-556 [44].

disagreeable or objectionable information from few to many by way of "agitation" for legislative and political change⁶⁵. Explained in the language of Kirby J⁶⁶:

"The form of government created by the Constitution is not confined to debates about popular or congenial topics, reflecting majority or party wisdom. Experience teaches that such topics change over time. In part, they do so because of general discussion in the mass media."

76 *Lange's* insight, first elucidated in *Australian Capital Television Pty Ltd v The Commonwealth*⁶⁷ and *Nationwide News Pty Ltd v Wills*⁶⁸, is that the majoritarian principle, upon which our system of representative and responsible government relies for its outworking, carries an inherent risk of legislative or executive impairment of "the capacity of, or opportunity for, the Australian people to form the political judgments required for the exercise of their constitutional functions"⁶⁹. An aspect of that systemic risk is that "political communications unhelpful or inconvenient or uninteresting to a current majority might be unduly impeded"⁷⁰.

77 The implied freedom of political communication is a structural implication serving to safeguard the efficacy of the system against realisation of that systemic risk⁷¹. *Lange's* demand for legislative justification, and correlative judicial scrutiny, of a legislative or executive burden on freedom of political communication is attuned to its mitigation.

65 *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 555-556 [44]-[45].

66 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 287 [218].

67 (1992) 177 CLR 106 at 143-145.

68 (1992) 177 CLR 1 at 50-51.

69 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 51. See *McCloy v New South Wales* (2015) 257 CLR 178 at 227-228 [114]-[117], 265 [245].

70 *Brown v Tasmania* (2017) 261 CLR 328 at 390 [202]. See also *Unions NSW v New South Wales* (2019) 264 CLR 595 at 622 [66].

71 See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 133-140; *McCloy v New South Wales* (2015) 257 CLR 178 at 222-230 [100]-[122].

78 *Lange* postulates, and *Brown v Tasmania*⁷² illustrates, that the balancing of the freedom to communicate on matters of government and politics against the protection of other legitimate societal interests is a matter for legislatures to "determine" but for courts to "supervise"⁷³. Under our system of representative and responsible government, as under some other similar systems, "the degree of legislative time, consultation and effort cannot act as a justificatory shield to guard against constitutional scrutiny": "[w]hat is of utmost relevance is the resulting legislative choice"⁷⁴. Legislative judgment about how a particular balance ought to be struck must be accorded respect. "But, in the ultimate analysis, it is for the [c]ourt to determine whether the constitutional guarantee has been infringed"⁷⁵.

The prohibitions infringe the constitutional guarantee

79 It may well be legitimate to seek to dry up an illegal market for stolen goods by prohibiting the possession and sale of goods known to have been obtained by burglary. However, the market sought to be dried up by the prohibitions in this case is a constitutionally protected "marketplace of ideas"⁷⁶. That marketplace is foundational to a "society organised under and controlled by law"⁷⁷. Within the marketplace of ideas, factual information bearing on matters of political and governmental concern known to its possessor and potential communicator to be true is all too often in short supply.

80 The prohibitions on communication and possession in question remove one source of that supply of true factual information having the potential to bear on matters of political and governmental concern. The source removed – visual imagery – is of its nature not only factual but peculiarly communicative. In *Levy v Victoria*, McHugh J adopted the submission of counsel that "[t]he impact of television depiction of the actual perpetration of cruelty, whether to humans or to other living creatures, has a dramatic impact that is totally different [from] saying,

72 (2017) 261 CLR 328.

73 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 50. See *McCloy v New South Wales* (2015) 257 CLR 178 at 230 [123].

74 *Quebec (Attorney General) v A* [2013] 1 SCR 61 at 233 [363].

75 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 144.

76 See *Abrams v United States* (1919) 250 US 616 at 630. See also *Ridd v James Cook University* (2021) 95 ALJR 878 at 887 [31]; 394 ALR 12 at 23.

77 *McCloy v New South Wales* (2015) 257 CLR 178 at 229-230 [122], quoting *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 142 and *Samuels v Readers' Digest Association Pty Ltd* (1969) 120 CLR 1 at 15.

"This is not a good idea"⁷⁸. The internet and the smartphone have only reinforced the persuasive power of visual imagery.

81 Not only do the blanket prohibitions on possession and communication of a visual record known to have been created as a result of a trespass to private property remove a source of peculiarly communicative true factual information capable of bearing on matters of political and governmental concern. They do so indiscriminately – regardless of the gravity of the information and of the extent to which electors, their elected representatives and executive officers may have an interest in receiving it.

82 Having regard to those considerations, I am of the opinion that the prohibitions impose a greater burden on political communication than can in all circumstances be justified as appropriate and adapted to the protection of the privacy of activities on private property. The prohibitions are too blunt; their price is too high; the cost they impose on the communication and receipt of information about matters of political and governmental concern is more than could be warranted for every activity which might be shown by a visual record to have occurred on private property. Expressed in terminology extolled in and since *McCloy v New South Wales*, the prohibitions are not "adequate in [their] balance"⁷⁹.

83 That the qualitative extent of the burden on communication and receipt of information about matters of political and governmental concern is more than can be justified for the purpose of protecting the privacy of activities on private property is sufficiently illustrated by *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*⁸⁰. There the recorded facts were as follows⁸¹:

"Lenah Game Meats Pty Ltd conducted the business of processing game meat, including possum meat which it sold for export. It killed and processed Tasmanian brush tail possums at licensed abattoirs. An unidentified person or persons broke and entered the abattoirs and, by boring holes in the roof, installed hidden video cameras. Those cameras recorded the possum-killing operations without the consent or knowledge of Lenah Game Meats. The cameras and video recording were retrieved by an unidentified person or persons and the recording was supplied to Animal Liberation Ltd (Animal Liberation), which, in turn, supplied the recording

78 (1997) 189 CLR 579 at 624.

79 (2015) 257 CLR 178 at 195 [2].

80 (2001) 208 CLR 199.

81 (2001) 208 CLR 199 at 200.

or part of it, to the Australian Broadcasting Corporation (the ABC) for television broadcasting."

84 The position of the ABC was described by Gleeson CJ⁸²:

"The [ABC] is in the business of broadcasting. ... [I]ts position is not materially different from a commercial broadcaster with whom it competes. In the ordinary course of its business it publishes information obtained from many sources, thereby contributing to the flow of information available to the public. The sources from which that information may come, directly or indirectly, cover a wide range of behaviour; some of it impeccable, some of it reprehensible, and all intermediate degrees. If the [ABC], without itself being complicit in impropriety or illegality, obtains information which it regards as newsworthy, informative, or entertaining, why should it not publish?"

85 The question was rhetorical. The holding in *Lenah Game Meats* was that there existed no basis in law upon which the ABC could be enjoined from publishing the information it had received in the form of the video recording. That was so notwithstanding that the ABC "probably realised, when it received the [video recording], that it had been made in a clandestine manner" and "certainly knew that by the time the application for an injunction was heard"⁸³.

86 The ABC in fact incorporated segments of the video recording into a story which it broadcast on the "7.30 Report" on 4 May 1999. As described in the narrative statement of facts in the appellant's submissions in *Lenah Game Meats*, that story was concerned with:

- the harvesting, slaughter and export of Australia's wildlife;
- the adequacy and possible reform of the Tasmanian Animal Welfare Code of Practice for Processing Brush Tail Possum which covered the capture, handling, transport and slaughter of possums in that State;
- the concerns of animal liberation groups about the treatment of possums, the holding and slaughtering process of such animals, the adequacy of the Tasmanian Animal Welfare Code of Practice for Processing Brush Tail Possum and the health and safety of possum meat for consumption;

82 (2001) 208 CLR 199 at 228 [46].

83 (2001) 208 CLR 199 at 214 [1].

- inspections by State and Commonwealth authorities of the possum slaughtering process at Lenah Game Meats' abattoirs;
- the role of the Tasmanian Department of Agriculture and Fisheries and Department of Health in regulating the export of wildlife; and
- the views of the Tasmanian Department of Primary Industry and the Animal Welfare Advisory Committee concerning Lenah Game Meats' activities.

87 The slaughter of animals for export is within the scope of the legislative power of the Commonwealth Parliament⁸⁴. The subject-matter was regulated under Commonwealth legislation at the time of the "7.30 Report" broadcast sought unsuccessfully to be enjoined in *Lenah Game Meats*⁸⁵, had been so regulated since at least 1935⁸⁶, and remains so regulated⁸⁷.

88 By force of the prohibitions now in question, the ABC or any other broadcaster, as well as Farm Transparency or any other publisher of video content, would now be prohibited from publishing or even possessing a similar video recording supplied to it in similar circumstances if it knew, whether by inference from the subject-matter of the recording or other information, that the recording was created as a result of trespass to an abattoir in New South Wales. That would be so irrespective of the significance of the subject-matter of the recording to government and political matters. Therein can be seen "the incremental effect of [the prohibitions] on the real-world ability of a person or persons to make or to receive communications which are capable of bearing on electoral choice"⁸⁸.

89 The special case alludes to other instances in recent history of video recordings – apparently showing animal cruelty and apparently created as a result

84 See *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565.

85 See the *Export Meat Orders* 1985 (Cth) and the *Prescribed Goods (General) Orders* 1985 (Cth) made pursuant to the *Export Control (Orders) Regulations* 1982 (Cth) under the *Export Control Act* 1982 (Cth).

86 See the *Meat Export Control (Licences) Regulations* (Cth) made under the *Meat Export Control Act* 1935 (Cth) and the *Commerce (Meat Export) Regulations* (Cth) made under the *Customs Act* 1901 (Cth), considered in *O'Sullivan v Noarlunga Meat Ltd* (1954) 92 CLR 565.

87 See the *Export Control (Meat and Meat Products) Rules* 2021 (Cth) and the *Export Control (Poultry Meat and Poultry Meat Products) Rules* 2021 (Cth) made under the *Export Control Act* 2020 (Cth).

88 *Brown v Tasmania* (2017) 261 CLR 328 at 386 [188]. See also at 365 [109].

of a trespass to private property – having come into the possession of a broadcaster, having been published by the broadcaster, and having stimulated national debate leading to executive inquiry and legislative change. There is no need to set out the details of those instances. They are notorious.

90 This is not an occasion for prognostication about how the common law rules and equitable principles examined in *Lenah Game Meats* and found not to impede publication of the video recording in that case might develop in the future in Australia. Clear from *Lange*⁸⁹, emphasised by Gleeson CJ in *Lenah Game Meats* itself⁹⁰, and recognised in contemporary academic writings on the potential development of a tort of privacy in Australia⁹¹, is that any development would need itself to follow a path consistent with the constitutional guarantee of freedom of political communication. That is so for development of the substantive law demarcating those activities that will and those that will not be afforded some measure of protection against public scrutiny at common law or in equity⁹². That must also be so for development of the adjectival law identifying considerations that are appropriate to be weighed in determining whether or not publication or possession will be the subject of discretionary relief⁹³. What is inconceivable is that any rule of common law or principle of equity would ever develop to the extent of prescribing and enforcing a blanket prohibition on communication or possession of any visual record known to have been created as a result of a trespass to private property irrespective of the nature of the activities revealed and irrespective of the systemic importance of electors, legislators and officers of the executive becoming aware of those activities.

91 The point is not that conformity with the constitutional guarantee of freedom of political communication means that political communication must

89 (1997) 189 CLR 520 at 566. See also *Aid/Watch Inc v Federal Commissioner of Taxation* (2010) 241 CLR 539 at 555-556 [44]-[45].

90 (2001) 208 CLR 199 at 219-220 [20], 224 [35].

91 See Gligoričević, "A Common Law Tort of Interference with Privacy for Australia: Reaffirming *ABC v Lenah Game Meats*" (2021) 44 *University of New South Wales Law Journal* 673 at 702-707; Lerch, "The Judicial Law-Making Function and a Tort of Invasion of Personal Privacy" (2021) 43 *Sydney Law Review* 133 at 138.

92 See now *A v Hayden* (1984) 156 CLR 532 at 544-545, 572; *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 454-456; *Minister for Immigration and Citizenship v Kumar* (2009) 238 CLR 448 at 456-457 [25]-[27].

93 See now *Australian Broadcasting Corporation v O'Neill* (2006) 227 CLR 57 at 72-73 [31]-[32].

always trump privacy. The point is that conformity with the constitutional guarantee means that privacy cannot always trump political communication.

92 Tellingly, legislative regimes which impose prohibitions on publication of visual records in order to protect the privacy of activities on private property in Victoria⁹⁴, Western Australia⁹⁵ and the Northern Territory⁹⁶ all contain exceptions for publications judicially determined to be in the public interest. The case-by-case judicial determination of the public interest imported into those broadly comparable State and Territory legislative regimes by those exceptions operates relevantly to ensure that the public interest in protecting privacy does not prevail in circumstances where protection by prohibiting publication of an extant record of activities that occurred on private property would be disproportionate to the public interest in electors and their elected representatives becoming aware of those activities⁹⁷.

93 Those other State and Territory legislative regimes are not just illustrations of the latitude of choice available to a legislature in protecting the privacy of activities occurring on private property in a manner that conforms to the constitutionally prescribed system of government. The public interest exceptions they incorporate cannot be explained away as mere details of legislative design.

94 The present significance of those other State and Territory legislative regimes is that they illustrate an adequacy of balance that is lacking from the blanket prohibitions imposed in New South Wales. An extant visual record of activities that in fact occurred on private property, which would be strongly or even overwhelmingly in the public interest for electors and their elected representatives to be made aware of, would be communicable if the record were of activities on private property in other States and Territories. The same extant visual record could not be knowingly communicated or even knowingly possessed if it were of activities on private property in New South Wales.

Construing the prohibitions more narrowly

95 What I have written so far explains my conclusion that, were ss 11 and 12 to operate fully and completely according to their terms in their application to a visual record that has resulted from a contravention of s 8, they would impose an unjustified burden on freedom of political communication in their application to

94 See s 11(2)(b)(i) of the *Surveillance Devices Act 1999* (Vic).

95 See s 9(2)(a)(viii) and Pt 5 of the *Surveillance Devices Act 1998* (WA).

96 See s 15(2)(b)(i) of the *Surveillance Devices Act 2007* (NT).

97 See *Hogan v Hinch* (2011) 243 CLR 506 at 536-537 [31]-[32], 544 [50], 548-549 [69]-[72], 556 [98].

communication and possession of (at least) some visual records which depict activities properly the subject-matter of political communication. Because that is so, ss 11 and 12 infringe the constitutional guarantee of freedom of political communication in their application to a visual record that has resulted from a contravention of s 8 and cannot be valid in their entirety.

96 The question is then as to whether, and if so how, ss 11 and 12 might be construed to have a narrower application in accordance with s 31(2) of the *Interpretation Act 1987* (NSW) so as not to infringe the constitutional guarantee.

97 The argument of the plaintiffs is that ss 11 and 12 should be construed to have no application to publication or possession of a visual record that is the subject-matter of a political communication. I accept that construction, which seems to me to involve an orthodox application of the orthodox understanding that "where a law is intended to operate in an area where Parliament's legislative power is subject to a clear limitation, it can be read as subject to that limitation"⁹⁸.

98 The Attorney-General of the Commonwealth has presented what might or might not be a different argument. The argument, which has been stated only at a high level and which has not been developed, has been couched in terms that s 31(2) of the *Interpretation Act* produces the result that each of ss 11 and 12 "operates to the extent that it does not impose an unjustified burden on the freedom of political communication". Given that I find myself in dissent in answering the questions asked by the parties in the special case, I propose to respond to the argument only in summary form.

99 The argument needs to be considered against the background of what in *Pidoto v Victoria*⁹⁹ Latham CJ described as an "interesting argument" then put on behalf of the Commonwealth. The argument was to the effect that, in the application of the materially identical provision in s 46(b) of the *Acts Interpretation Act 1901* (Cth), "the function of the Court, when it finds [an enactment expressed in general terms] bad in its application to particular circumstances, is limited to declaring [the enactment] bad to that extent, the enactment being left to operate in all cases to which it can validly apply"¹⁰⁰. The argument was rejected.

98 *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502-503. See *Coleman v Power* (2004) 220 CLR 1 at 55-56 [110]; *Clubb v Edwards* (2019) 267 CLR 171 at 221-222 [149], 290-291 [341].

99 (1943) 68 CLR 87 at 108.

100 (1943) 68 CLR 87 at 97.

100 Latham CJ said that the argument appeared "to require the Court to perform a feat which is in essence legislative and not judicial"¹⁰¹. Section 46(b) of the *Acts Interpretation Act*, he pointed out, did not purport to set out "a rule of law" as to the circumstances in which an enactment expressed in general terms would have valid application but rather set out "a rule of construction" to the effect that "if an intention of Parliament that there should be a partial operation of the law based upon some particular standard criterion or test can be discovered from the terms of the law itself or from the nature of the subject matter with which the law deals, it can be read down so as to give valid operation of a partial character"¹⁰². Post-judicially, Latham CJ referred to those principles as belonging to a body of law relating "rather to the interpretation of statutes in the light of the [*Acts Interpretation Act*] than to the interpretation of the Constitution itself"¹⁰³.

101 To postulate that a legislative provision – the operation of which in some but not all circumstances imposes an unjustified burden on freedom of political communication – can operate to the extent that the provision does not impose an unjustified burden on the freedom of political communication, may be no more than to describe the consequence that applying an interpretation provision such as s 31(2) of the *Interpretation Act* or s 15A or s 46(b) of the *Acts Interpretation Act* will have if some standard, criterion or test can be discerned by which the legislative provision in question can be construed to have a partial operation. If that is all that is meant by the argument of the Attorney-General, I do not disagree. The conclusion to which the argument leads me is acceptance of the plaintiffs' construction of ss 11 and 12, to which I have already referred, in accordance with which the prohibitions on communication and possession, in their application to a visual record that has resulted from a contravention of s 8, are to be understood as having no application to a visual record that is the subject-matter of a political communication.

102 If the Attorney-General's argument means instead that a legislative provision which operates in some but not all circumstances to impose an unjustified burden on freedom of political communication can be given a piecemeal operation based on a judicial assessment of whether the burden it imposes is or is not justified in its application to the particular circumstances thrown up by the facts of a particular case, I reject the argument as inconsistent

101 (1943) 68 CLR 87 at 109, quoting *R v Burgess*; *Ex parte Henry* (1936) 55 CLR 608 at 676 (cleaned up).

102 (1943) 68 CLR 87 at 110-111. See also *Re Nolan*; *Ex parte Young* (1991) 172 CLR 460 at 487.

103 Latham, "Interpretation of the Constitution", in Else-Mitchell (ed), *Essays on the Australian Constitution*, 2nd ed (1961) 1 at 46.

with the reasons given by Latham CJ for rejecting the argument then put on behalf of the Commonwealth in *Pidoto*.

103 The majority answers the questions asked by the parties on the basis that ss 11 and 12 can be construed in accordance with s 31(2) of the *Interpretation Act* more narrowly to have no application to the publication or possession of a visual record that has resulted from a contravention of s 8 in which the publisher or possessor of the record has not been complicit. Were I to consider that construction to result in ss 11 and 12 being narrowed to the extent of no longer operating to impose an unjustified burden on freedom of political communication, I would accept the construction to be consistent with *Pidoto*.

104 My difficulty is that I cannot accept that narrowing the operation of ss 11 and 12, merely to the extent of excluding their application to the publication or possession of a visual record that has resulted from a contravention of s 8 in which the publisher or possessor of the record has not been complicit, would result in the prohibitions they impose achieving an adequacy of balance that is compatible with the maintenance of the system of representative and responsible government which the implied freedom of political communication exists to protect. Each section would still apply to prohibit publication or possession of a visual record that has already been brought into existence. And each would still operate irrespective of the nature of the activities revealed by that extant visual record and irrespective of the systemic importance of electors, legislators and officers of the executive being able to be made aware of those activities.

My answers to the questions

105 Each of Questions (1) and (3) asked by the parties in the special case should be answered: "In its application to a visual record that has resulted from the use of an optical surveillance device in contravention of s 8, the section imposes an unjustified burden on freedom of political communication. Otherwise the question does not arise." Each of Questions (2) and (4) should be answered: "The section must be construed to have no application to a visual record that is the subject-matter of a political communication." Question (5) should be answered: "The defendant."

106 GORDON J. The plaintiffs challenged the validity of ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW) as infringing the implied freedom of political communication. Sections 11 and 12 prohibit, in broad terms, the publication and possession of material obtained as a result of the use of certain surveillance devices in contravention of Pt 2 of the *Surveillance Devices Act*.

107 The operation of ss 11 and 12 of the *Surveillance Devices Act* is predicated on a prior contravention of Pt 2 of the *Surveillance Devices Act*, particularly, ss 7, 8 and 9. The scope of the prohibitions, the effective burden on political communication and their justification differ depending on which of ss 7, 8 or 9 in Pt 2 engages ss 11 and 12. This is because ss 11 and 12 operate on substantially different premises depending on whether the prior contravention of Pt 2 is a breach of s 7 (installation, use or maintenance of listening devices only in relation to a "private conversation"), s 8 (installation, use or maintenance of an optical surveillance device "to record visually or observe the carrying on of an activity if the installation, use or maintenance of the device involves" entry into premises or a vehicle, or interference with a vehicle or other object, without consent), or s 9 (installation, use or maintenance of a tracking device to determine the geographical location of a person or object without consent).

108 The second plaintiff, Mr Delforce, is an activist for animal welfare and animal rights. Mr Delforce has engaged in activity that purportedly contravenes ss 8, 11 and 12 of the *Surveillance Devices Act*. He intends to engage in activity that would purportedly contravene ss 11 and 12 of the *Surveillance Devices Act* in the future.

109 Mr Delforce is also a director of the first plaintiff, Farm Transparency International Ltd ("Farm Transparency")¹⁰⁴, and has a significant involvement in Farm Transparency's operations. Farm Transparency, a not-for-profit charity, was established to pursue the purpose of preventing and relieving the suffering of animals, including by raising public awareness about animal cruelty. It engages in activities including publishing photographs, videos and audio-visual recordings of animal agricultural practices in Australia. Farm Transparency has engaged in activity that purportedly contravenes ss 11 and 12 and may do so in the future.

110 The facts stated in the Amended Special Case establish that Mr Delforce was a trespasser for the purposes of s 8 and, in purported contravention of ss 11 and 12, published the material he obtained unlawfully while he trespassed. The facts also establish that Farm Transparency is at least complicit in that trespass. As will be seen, the nature and extent of the burden on the implied freedom of political communication is different for persons, like the plaintiffs,

104 The successor entity of Aussie Farms Inc, Farm Transparency Project Inc and Dominion Movement Inc.

who are trespassers or otherwise complicit in trespass, as compared with persons who have not trespassed or are not otherwise complicit.

Scope of plaintiffs' challenge

111 Questions 1 and 3 of the Amended Special Case ask the Court to consider the validity of ss 11 and 12 *in all of their operations* (that is, in their operations with each of ss 7 to 9). Those questions reflect the declaratory relief sought by the plaintiffs, namely that ss 11 and 12 are wholly invalid. The plaintiffs subsequently clarified that they only challenged the validity of ss 11 and 12 in their operations with ss 7 and 8.

112 It was not in dispute that the plaintiffs have standing to challenge the validity of ss 11 and 12 of the *Surveillance Devices Act*. The question of standing is, however, distinct from the question as to the extent to which the Court should determine the validity of ss 11 and 12. The difficulty for the plaintiffs is that the Amended Special Case confines the scope of the plaintiffs' challenge.

113 The Amended Special Case does not demonstrate that "there exists a state of facts which makes it necessary to decide" the validity of ss 11 and 12 of the *Surveillance Devices Act* in their operations with ss 7 or 9¹⁰⁵. That requires elaboration.

Prudential approach – state of facts needed to make it necessary to decide constitutional questions

114 In *Lambert v Weichelt*¹⁰⁶, Dixon CJ (on behalf of the Court) observed that "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide ... a question in order to do justice in the given case and to determine the rights of the parties". That approach (sometimes termed the "prudential approach") has been endorsed and elaborated upon by the High Court on several occasions¹⁰⁷, including very recently. For present purposes, it is sufficient to refer to the Court's recent

¹⁰⁵ *Lambert v Weichelt* (1954) 28 ALJ 282 at 283.

¹⁰⁶ (1954) 28 ALJ 282 at 283.

¹⁰⁷ *Tajjour v New South Wales* (2014) 254 CLR 508 at 587-589 [173]-[176]; *Knight v Victoria* (2017) 261 CLR 306 at 324-326 [32]-[37]; *Clubb v Edwards* (2019) 267 CLR 171 at 192-193 [32]-[36], 216-217 [135]-[138], 287-288 [329]-[332]; *Zhang v Commissioner of the Australian Federal Police* (2021) 95 ALJR 432 at 438 [22]-[23]; 389 ALR 363 at 368-369; *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 846-847 [56]-[60]; 393 ALR 551 at 565-566.

consideration of the prudential approach in *Mineralogy Pty Ltd v Western Australia*¹⁰⁸.

115 In *Mineralogy*¹⁰⁹, the plurality emphasised that the "cautious and restrained approach to answering questions agreed by the parties in a special case is a manifestation of a more general prudential approach to resolving questions of constitutional validity 'founded on the same basal understanding of the nature of the judicial function as that which has informed the doctrine that the High Court lacks original or appellate jurisdiction to answer any question of law (including but not confined to a question of constitutional law) if that question is divorced from the administration of the law'". The plurality stated that "[u]nderlying the prudential approach is recognition that the function performed by the Full Court in answering a question of law stated for its opinion is not advisory but adjudicative. Underlying it also is recognition that performance of an adjudicative function in an adversary setting 'proceeds best when it proceeds if, and no further than is, warranted to determine a legal right or legal liability in controversy'"¹¹⁰.

116 The plurality went on to identify four "implications of the prudential approach"¹¹¹: first, "a party will not be permitted to 'roam at large' but will be confined to advancing those grounds of challenge which bear on the validity of the provision in its application to that party"; second, "it is ordinarily inappropriate for the [Full] Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise if the provision, if invalid in that operation, would be severable and otherwise valid"; third, "the application of an impugned legislative provision to the facts must appear from the special case with sufficient clarity both to identify the right, duty or liability that is in controversy and to demonstrate the necessity of answering the question of law to the judicial resolution of that controversy"; and, fourth, "the necessity of answering the question of law to the judicial resolution of the controversy may not sufficiently appear where there remains a prospect that the controversy can be judicially determined on another basis".

117 Thus, although the plaintiffs have standing, that does not mean they are permitted to "roam at large" over the impugned provisions¹¹². They are confined to advancing grounds of challenge which bear on the validity of the impugned

108 (2021) 95 ALJR 832; 393 ALR 551.

109 (2021) 95 ALJR 832 at 846 [57]; 393 ALR 551 at 565.

110 *Mineralogy* (2021) 95 ALJR 832 at 846 [58]; 393 ALR 551 at 566.

111 *Mineralogy* (2021) 95 ALJR 832 at 847 [59]-[60]; 393 ALR 551 at 566.

112 *Knight* (2017) 261 CLR 306 at 324-325 [33].

provisions in their application to them. More particularly, they are confined by the factual basis they have agreed to in the Amended Special Case.

118 There is no dispute between the parties or interveners that it is appropriate for this Court to determine whether ss 11 and 12, in their operations with s 8, are invalid. Section 8(1) prohibits the installation, use or maintenance of an optical surveillance device on premises, vehicles or objects to "record visually" or "observe" the carrying on of an activity in certain circumstances. But there is nothing in the Amended Special Case to suggest that the plaintiffs' rights and liabilities are, or will be, affected by ss 11 and 12 in their operations with ss 7 or 9.

119 None of the facts stated in the Amended Special Case expressly refer to or address any activity that has amounted (or will amount) to a contravention of ss 7 or 9 and is capable of providing the foundation for an offence against ss 11 or 12. And it is not possible to draw any inference from the facts stated in the Amended Special Case as to the potential engagement of ss 11 or 12 in respect of a contravention of ss 7 or 9; there is simply nothing that addresses the use of listening devices in respect of private conversations or the use of a tracking device to ascertain a person's geographical location.

120 The plaintiffs have not established that "there exists a state of facts which makes it necessary to decide [the validity of ss 11 and 12 in their operations with ss 7 or 9] in order to do justice in the ... case and to determine the rights of the parties"¹¹³. Applying the prudential approach, this Court ought to determine the constitutional validity of ss 11 and 12 only in their operations with s 8.

Validity

121 Sections 11 and 12 of the *Surveillance Devices Act*, in their operations with s 8, as a general rule, are invalid to the extent that they place an *unjustified burden* on communication on governmental or political matters, namely on such communication by persons who do not themselves contravene s 8 and are not complicit in such a contravention where the underlying information is not otherwise confidential. It is a general rule because there may be circumstances where other relief might go. Cases of that kind were not identified or the subject of argument.

122 Subject to contrary statutory intention¹¹⁴, s 31 of the *Interpretation Act 1987* (NSW) reverses the presumption that the *Surveillance Devices Act* is to operate as a whole, so that the intention of the legislature is to be taken, *prima facie*, to be

113 *Lambert* (1954) 28 ALJ 282 at 283.

114 *Interpretation Act 1987* (NSW), s 5(2).

that the *Surveillance Devices Act* should be divisible and that any parts found constitutionally unobjectionable should be carried into effect independently of those which fail¹¹⁵. No contrary intention is found in ss 11 and 12 or in the broader context of the *Surveillance Devices Act*. There is nothing in the *Surveillance Devices Act* to manifest an intention that ss 11 and 12 should be wholly invalid if they cannot apply in respect of persons, subject matters or circumstances to which they would otherwise have been construed as applicable¹¹⁶. To the extent that ss 11 and 12, in their operations with s 8, impermissibly infringe the implied freedom, then, pursuant to s 31 of the *Interpretation Act*, they can be read down to give the provisions a "partial but constitutionally valid operation"¹¹⁷.

123 Sections 11 and 12, in their operations with s 8, should be read down as having no application to the extent that the provisions place an *unjustified burden* on communication on governmental or political matters. It would not be necessary, and indeed it would be inappropriate, to read ss 11 and 12 as not applying to governmental or political matters generally.

124 To explain the structure of these reasons, three points should be made at the outset. First, the critical starting point is the legal effect and practical operation of ss 11 and 12, in their operations with s 8. That is a question of statutory construction. Second, the purpose, legal effect and practical operation of the sections can properly be determined only by detailed reference to the wider legal context. Third, the wider legal context includes the existing common law, equity and statute. It is in that wider legal context that ss 11 and 12 have legal effect and practical operation. That analysis identifies the nature and extent of the incremental burden that the sections impose on the implied freedom of political communication. It establishes that the nature and extent of the incremental burden is not uniform.

Surveillance Devices Act

125 Although the provisions of the *Surveillance Devices Act* are set out in other reasons, it is necessary for the development of these reasons to restate important parts of the Act.

115 *Tajjour* (2014) 254 CLR 508 at 585-586 [169]; *Clubb* (2019) 267 CLR 171 at 218-219 [140]-[141], 290 [340].

116 *Interpretation Act*, s 5(2); *Tajjour* (2014) 254 CLR 508 at 585 [169]; *Knight* (2017) 261 CLR 306 at 325-326 [35]-[36]; *Clubb* (2019) 267 CLR 171 at 291 [342], 291-292 [345], 324 [440].

117 cf *Clubb* (2019) 267 CLR 171 at 288 [334]; see also 289 [337].

Long title and objects

126 The long title of the *Surveillance Devices Act*, relevantly, is: "An Act to regulate the installation, use, maintenance and retrieval of surveillance devices ... and for other purposes". The express objects of the Act¹¹⁸ are:

- "(a) to provide law enforcement agencies with a comprehensive framework for the use of surveillance devices in criminal investigations, and
- (b) to enable law enforcement agencies to covertly gather evidence for the purposes of criminal prosecutions, and
- (c) *to ensure that the privacy of individuals is not unnecessarily impinged upon by providing strict requirements around the installation, use and maintenance of surveillance devices.*" (emphasis added)

Structure of Surveillance Devices Act

127 The *Surveillance Devices Act* deals with a range of subjects, including: regulation of the installation, use and maintenance of surveillance devices, involving the prohibition of identified conduct (Pt 2); warrants for the installation, use and maintenance of surveillance devices (Pt 3); recognition of warrants and other authorisations in relation to surveillance devices issued by other Australian polities (Pt 4); and compliance, enforcement and administration (Pts 5 and 6). These proceedings are concerned particularly with Pt 2.

Part 2 – prohibitions on installation, use and maintenance of surveillance devices

128 Part 2, headed "Regulation of installation, use and maintenance of surveillance devices", contains a number of prohibitions relating to the installation, use and maintenance of various surveillance devices. This proceeding involves a challenge to the validity of the prohibitions in ss 11 and 12. It is, however, necessary to place those provisions within the broader statutory framework established by the *Surveillance Devices Act*. This is particularly important because, as has been stated, ss 11 and 12 are engaged only in circumstances involving certain contraventions of other provisions of Pt 2¹¹⁹. For present purposes, it is sufficient to consider s 8.

118 *Surveillance Devices Act*, s 2A.

119 The note under the heading to Pt 2 states that offences in Pt 2 "must be dealt with on indictment". See also *Criminal Procedure Act 1986* (NSW), s 5(1).

Section 8 – prohibition on installation, use and maintenance of optical surveillance devices without consent

129 Section 8(1) prohibits the installation, use and maintenance of optical surveillance devices without consent¹²⁰. It provides:

"A person must not knowingly install, use or maintain an optical surveillance device on or within premises or a vehicle or on any other object, to record visually or observe the carrying on of an activity if the installation, use or maintenance of the device involves –

- (a) entry onto or into the premises or vehicle without the express or implied consent of the owner or occupier of the premises or vehicle, or
- (b) interference with the vehicle or other object without the express or implied consent of the person having lawful possession or lawful control of the vehicle or object."

130 "[O]ptical surveillance device" is defined to mean "any device capable of being used to record visually or observe an activity, but ... not includ[ing] spectacles, contact lenses or a similar device used by a person with impaired sight to overcome that impairment"¹²¹. "[P]remises" is defined to include "(a) land, (b) a building, (c) a part of a building, [and] (d) any place, whether built on or not"¹²². "[A]ctivity" and "carrying on of an activity" are not defined in the *Surveillance Devices Act*.

131 Section 8 therefore prohibits knowingly installing, using or maintaining an optical surveillance device on or within premises or a vehicle or on any object to record visually or observe "the carrying on of an activity", where it involves (a) entry onto or into premises or a vehicle without the express or implied consent of the owner or occupier; or (b) interference with a vehicle or object without the express or implied consent of the person with lawful possession or control of the vehicle or object. In general terms, s 8(1) prohibits installing, using or maintaining an optical surveillance device whilst trespassing or interfering with property without consent.

132 But it is equally important to identify what s 8(1) does *not* prohibit. First, ss 8(2) and 8(2A) identify exceptions to the prohibition in s 8(1). Section 8(1) does

120 The maximum penalty for a breach of s 8(1) is 500 penalty units for a corporation or 100 penalty units or five years' imprisonment, or both, in any other case.

121 *Surveillance Devices Act*, s 4(1) definition of "optical surveillance device".

122 *Surveillance Devices Act*, s 4(1) definition of "premises".

not apply to, among other things, "the installation, use or maintenance of an optical surveillance device in accordance with a warrant, emergency authorisation, corresponding warrant or corresponding emergency authorisation"¹²³ or "in accordance with a law of the Commonwealth"¹²⁴. It also does not apply to use by certain law enforcement officers in specified circumstances¹²⁵.

133 Second, s 8 of the *Surveillance Devices Act* does not engage with, and has no application to, the installation, use or maintenance of an optical surveillance device by any person, including an employee, who is not a trespasser or is not interfering with an object or vehicle. Sections 11 and 12 are not engaged and have nothing to say about those activities *not* caught by a contravention of Pt 2 of the *Surveillance Devices Act*, relevantly here, s 8.

Sections 11 and 12

134 Section 11 is headed "Prohibition on communication or publication of private conversations or recordings of activities". Section 11(1) provides¹²⁶:

"A person must not *publish, or communicate* to any person, a private conversation or *a record of the carrying on of an activity, or a report of* a private conversation or *carrying on of an activity, that has come to the person's knowledge as a direct or indirect result of the use of* a listening device, *an optical surveillance device* or a tracking device *in contravention of a provision of [Pt 2]*." (emphasis added)

"[R]ecord" includes "(a) an audio, visual or audio visual record, (b) a record in digital form, [and] (c) a documentary record prepared from a record referred to in paragraph (a) or (b)"¹²⁷. "[R]eport", in relation to a conversation or activity, "includes a report of the substance, meaning or purport of the conversation or activity"¹²⁸.

123 *Surveillance Devices Act*, s 8(2)(a).

124 *Surveillance Devices Act*, s 8(2)(b).

125 *Surveillance Devices Act*, ss 8(2)(d), 8(2)(d1), 8(2)(e), 8(2)(f), 8(2A).

126 The maximum penalty for a breach of s 11(1) is 500 penalty units for a corporation or 100 penalty units or five years' imprisonment, or both, in any other case.

127 *Surveillance Devices Act*, s 4(1) definition of "record".

128 *Surveillance Devices Act*, s 4(1) definition of "report".

135 Section 11(2) provides that s 11(1) does not apply to the following:

- "(a) if the communication or publication is made –
 - (i) to a party to the private conversation or activity, or
 - (ii) with the consent, express or implied, of all the principal parties to the private conversation or activity, or
 - (iii) for the purpose of investigating or prosecuting an offence against this section, or
 - (iv) in the course of proceedings for an offence against this Act or the regulations,
- (b) if the communication or publication is no more than is reasonably necessary in connection with an imminent threat of –
 - (i) serious violence to persons or of substantial damage to property, or
 - (ii) commission of a serious narcotics offence."

136 Section 11(3) then provides that "[a] person who obtains knowledge of a private conversation or activity in a manner that does not involve a contravention of a provision of [Pt 2] is not prevented from communicating or publishing the knowledge so obtained even if the same knowledge was also obtained in a manner that contravened [Pt 2]".

137 Section 12 is headed "Possession of record of private conversation or activity". Section 12(1) provides¹²⁹:

"A person must not *possess a record of a private conversation or the carrying on of an activity knowing that it has been obtained, directly or indirectly, by the use of a listening device, optical surveillance device or tracking device in contravention of [Pt 2].*" (emphasis added)

138 Section 12(2) provides that s 12(1) does not apply, relevantly, where the record is in the possession of the person "in connection with proceedings for an offence against [the] Act or [its] regulations"¹³⁰; "with the consent, express or

129 The maximum penalty for a breach of s 12(1) is 500 penalty units for a corporation or 100 penalty units or five years' imprisonment, or both, in any other case.

130 *Surveillance Devices Act*, s 12(2)(a).

implied, of all of the ... persons who took part in the activity"¹³¹; or "as a consequence of a communication or publication of that record to that person in circumstances that do not constitute a contravention of [Pt 2]"¹³².

Proper approach to construction of ss 11 and 12

139 As with any question of constitutional validity, before determining the validity of ss 11 and 12 of the *Surveillance Devices Act*, it is necessary to identify their proper construction¹³³. Sections 11 and 12 are offence provisions, which are to be construed in accordance with the ordinary rules of statutory construction¹³⁴. The proper construction of ss 11 and 12 is, therefore, "to be found in the meaning of the statutory language, read in its statutory context and in light of its statutory purpose"¹³⁵.

140 When construing an offence provision, the provision must be read in the light of the "general principles of criminal responsibility", although the language of the statute is ultimately controlling¹³⁶. Relevantly for present purposes, there is a common law presumption that "mens rea" (a fault or mental element) is an essential ingredient in every statutory offence¹³⁷. That presumption may be displaced by the statute. It is not displaced here.

131 *Surveillance Devices Act*, s 12(2)(b).

132 *Surveillance Devices Act*, s 12(2)(c).

133 *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 519 [125]; 391 ALR 188 at 220, citing *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1 at 7, *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476 at 498-499 [53], *Coleman v Power* (2004) 220 CLR 1 at 21 [3], 68 [158], *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 at 553 [11], *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569 at 581 [11] and *Brown v Tasmania* (2017) 261 CLR 328 at 428 [307], 433-434 [326], 479-480 [485]-[486], 481 [488].

134 *Aubrey v The Queen* (2017) 260 CLR 305 at 325-326 [39].

135 *North Australian Aboriginal Justice Agency* (2015) 256 CLR 569 at 605 [81]; see also 581 [11].

136 *CTM v The Queen* (2008) 236 CLR 440 at 446 [5]; see also 483-484 [148].

137 *He Kaw Teh v The Queen* (1985) 157 CLR 523 at 528-529, 530, 565-568, 582, 590-591. See also *Sherras v De Rutzen* [1895] 1 QB 918 at 921; *Lim Chin Aik v The Queen* [1963] AC 160 at 173; *Warner v Metropolitan Police Commissioner* [1969]

141 In identifying the applicable mental element, Brennan J explained in *He Kaw Teh v The Queen*¹³⁸ that "[t]here is a presumption that in every statutory offence, it is implied as an element of the offence that the person who commits the actus reus *does the physical act defined in the offence voluntarily and with the intention of doing an act of the defined kind*" (emphasis added). The mental element for a physical act is intention.

142 Next, Brennan J explained that¹³⁹:

"[t]here is a further presumption in relation to the *external elements of a statutory offence that are circumstances attendant* on the doing of the physical act involved. It is implied as an element of the offence that, at the time when the person who commits the actus reus does the physical act involved, he either – (a) *knows the circumstances* which make the doing of that act an offence; or (b) *does not believe honestly and on reasonable grounds* that the circumstances which are attendant on the doing of that act are such as to make the doing of that act innocent." (emphasis added)

Whether the applicable state of mind is knowledge or absence of exculpatory belief depends on the nature of the offence and which state of mind "is more consonant with the fulfilment of the purpose of the statute"¹⁴⁰. But, ordinarily the presumption at common law¹⁴¹ is that the accused had knowledge of the circumstance which makes doing the act an offence.

143 As Brennan J explained in *He Kaw Teh*¹⁴²:

"However grave the mischief at which a statute is aimed may be, the presumption is that the statute does not impose criminal liability without mens rea unless the purpose of the statute is not merely to deter a person from engaging in prohibited conduct but to compel him to take preventive

2 AC 256 at 272; *Cameron v Holt* (1980) 142 CLR 342 at 346, 348; *Gammon (Hong Kong) Ltd v Attorney-General of Hong Kong* [1985] AC 1 at 12-13; *CTM* (2008) 236 CLR 440 at 483-484 [148]; *Ross on Crime*, 9th ed (2022) at 1124 [13.2320].

138 (1985) 157 CLR 523 at 582; see also 570. See also *Director of Public Prosecutions Reference No 1 of 2004* (2005) 12 VR 299 at 302 [8].

139 *He Kaw Teh* (1985) 157 CLR 523 at 582.

140 *He Kaw Teh* (1985) 157 CLR 523 at 582.

141 cf *Criminal Code* (Cth), s 5.6(2), which makes "recklessness" the default fault element for a circumstance.

142 (1985) 157 CLR 523 at 567.

measures to avoid the possibility that, without deliberate conduct on his part, the external elements of the offence might occur. A statute is not so construed unless effective precautions can be taken to avoid the possibility of the occurrence of the external elements of the offence."

Brennan J added that "[t]he requirement of mens rea is at once a reflection of the purpose of the statute and a humane protection for persons who unwittingly engage in prohibited conduct"¹⁴³.

Proper construction of ss 11 and 12 – legal effect and practical operation

144 Consistently with established authority, and contrary to the position adopted in their written submissions, the plaintiffs accepted in oral argument that s 11 has mental elements. Indeed, Parliament is unlikely to have created an offence of absolute liability punishable by five years' imprisonment¹⁴⁴. It was not in dispute that s 12 contains a mental element.

Section 11

145 Section 11 has two "external" elements: relevantly, (1) the *physical* act of publishing or communicating to any person "a private conversation or a record of the carrying on of an activity, or a report of a private conversation or carrying on of an activity" and (2) the *attendant circumstance* that the matter published or communicated came to the accused's knowledge "as a direct or indirect result of the use of", relevantly, an optical surveillance device in contravention of s 8.

146 Section 11(1) does not explicitly exclude a mental element for either element. Applying the principles identified above, absent express words or necessary implication, s 11(1) must be presumed to imply mental elements in respect of both external elements: the physical act of publishing or communicating must be accompanied by an *intention* to do that physical act; and the attendant circumstance – that the matter published or communicated came to the accused's knowledge as a direct or indirect result of the use of identified surveillance devices in contravention of s 8 – has a *fault* element of knowledge.

Section 12

147 There is only one external element of the s 12(1) offence, namely: possessing "a record of a private conversation or the carrying on of an activity". As the Attorney-General of the Commonwealth submitted, the concept of "possession" imports a requirement that the accused had some awareness that the

143 *He Kaw Teh* (1985) 157 CLR 523 at 568.

144 *He Kaw Teh* (1985) 157 CLR 523 at 530.

record was within the accused's custody or control¹⁴⁵. The fault element accompanying that external element is expressly identified in s 12(1) as knowledge that the record was "obtained, directly or indirectly, by the use of", relevantly, an optical surveillance device in contravention of s 8.

148 Two points should be noted about the construction of s 12. First, as the plaintiffs submitted, a person could come into possession of a record not knowing at the time of taking possession that the record was obtained in contravention of s 8. That would not be a breach of s 12(1). But if they later learn that the record was obtained unlawfully, they will commit an offence under s 12(1) at that point. Second, in effect, s 12 operates to criminalise the knowing possession of unlawfully obtained surveillance material by any person, including a would-be publisher.

Matters common to ss 11 and 12

149 Some other matters common to both ss 11 and 12 should also be noted. First, ss 11 and 12 apply generally to a "person", defined to include "an individual, a corporation and a body corporate or politic"¹⁴⁶. Second, while ss 11 and 12 prohibit the publication, communication or possession of "a record of a *private* conversation" or "the carrying on of an activity" (emphasis added), there is no requirement that the "activity" be a "private" activity. Third, ss 11 and 12 extend, relevantly, to a record obtained¹⁴⁷, or (in respect of s 11) a report that has come to a person's knowledge¹⁴⁸, as a direct or indirect result of the use of an optical surveillance device. This makes it clear that the use of intermediaries does not absolve a person who ultimately publishes or communicates or possesses a record or report.

150 Sections 11 and 12 capture persons who have trespassed as well as those complicit in trespass and prohibits them from publishing and possessing material that they themselves obtained (or were somehow complicit in obtaining) in contravention of s 8. The fault elements of ss 11 and 12 will always be satisfied in respect of those persons. But they also capture other persons – third parties who had no involvement in the trespass, but who have knowledge that the information was obtained in contravention of s 8.

151 In addition to the statutory carve-outs in ss 11 and 12 (as well as s 8) to which reference has already been made, ss 11 and 12 do not apply to information

145 *He Kaw Teh* (1985) 157 CLR 523 at 537-539, 589, 599.

146 *Interpretation Act*, s 21(1) definition of "person".

147 *Surveillance Devices Act*, ss 11(1) and 12(1).

148 *Surveillance Devices Act*, s 11(1).

already in the public domain¹⁴⁹, although the exception is in different terms in ss 11(3) and 12(2)(c).

Implied freedom of political communication

152 The implied freedom of political communication is a constitutional implication arising from ss 7, 24, 62, 64 and 128 of the *Constitution*. It may be conveniently described as follows¹⁵⁰:

"[It] is an indispensable incident of the system of representative and responsible government which the *Constitution* creates and requires. The freedom is implied because ss 7, 24 and 128 of the *Constitution* (with Ch II, including ss 62 and 64) create a system of representative and responsible government. It is an indispensable incident of that system because that system requires that electors be able to exercise a free and informed choice when choosing their representatives, and, for them to be able to do so, there must be a free flow of political communication within the federation. For that choice to be exercised effectively, the free flow of political communication must be between electors and representatives and 'between all persons, groups and other bodies in the community'.

The implied freedom operates as a constraint on legislative and executive power. It is a freedom from government action, not a grant of individual rights. The freedom that the *Constitution* protects is not absolute. The limit on legislative and executive power is not absolute. The implied freedom does not protect all forms of political communication at all times and in all circumstances. And the freedom is not freedom from all regulation or restraint. Because the freedom exists only as an incident of the system of representative and responsible government provided for by the *Constitution*, the freedom limits legislative and executive power only to the extent necessary for the effective operation of that system."

153 The applicable principles are well established. Whether the impugned provisions are invalid for impermissibly burdening the implied freedom falls to be assessed by reference to the following questions¹⁵¹: Do the impugned provisions

149 *Surveillance Devices Act*, ss 11(3) and 12(2)(c).

150 *Brown* (2017) 261 CLR 328 at 430 [312]-[313] (footnotes omitted). See also *LibertyWorks* (2021) 95 ALJR 490 at 520 [131]; 391 ALR 188 at 222.

151 See the test identified in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561-562, 567-568, as modified and refined in *Coleman* (2004) 220 CLR 1 at 50 [93], 51 [95]-[96], *McCloy v New South Wales* (2015) 257 CLR 178 at 193-195 [2] and *Brown* (2017) 261 CLR 328 at 359 [88], 363-364 [104], 375-376

effectively burden the freedom of political communication? Is the purpose of the impugned provisions legitimate, in the sense that it is consistent with the maintenance of the constitutionally prescribed system of government? Are the impugned provisions reasonably appropriate and adapted to advance that purpose in a manner consistent with the maintenance of the constitutionally prescribed system of government? If the first question is answered "yes", and the second or third question is answered "no", the impugned provisions will impermissibly burden the implied freedom and therefore be invalid.

First question – effective burden?

154 The first question – whether the impugned provisions effectively burden the implied freedom in their terms, operation or effect – requires consideration of how the law "affects the freedom generally"¹⁵², although the burden in a specific case may provide a useful example of a law's practical effect¹⁵³. A law will effectively burden the freedom of political communication if "the effect of the law is to prohibit, or put some limitation on, the making or the content of political communications"¹⁵⁴.

Nature and extent of burden

155 There was no dispute between the parties or interveners (other than the Attorney-General for Western Australia) that ss 11 and 12 impose an effective burden on political communication.

156 It is, however, appropriate to consider the nature and extent of the burden by reference to the legal effect and practical operation of ss 11 and 12 in the wider legal context before considering whether the burden is justified, as this "serves to focus and to calibrate the inquiry" as to whether the provisions are reasonably appropriate and adapted¹⁵⁵.

[156], 398 [236], 413 [271], 416-417 [277]-[278], 432-433 [319]-[325]. See also *LibertyWorks* (2021) 95 ALJR 490 at 503-504 [44]-[46], 512 [93], 520-521 [131]-[134]; 391 ALR 188 at 199-200, 210-211, 222-223.

152 *Unions NSW v New South Wales* (2013) 252 CLR 530 at 553 [35].

153 *Brown* (2017) 261 CLR 328 at 360 [90].

154 *Monis v The Queen* (2013) 249 CLR 92 at 142 [108]. See also *Comcare v Banerji* (2019) 267 CLR 373 at 395 [20]; *LibertyWorks* (2021) 95 ALJR 490 at 521 [136]; 391 ALR 188 at 223-224.

155 *Tajjour* (2014) 254 CLR 508 at 579 [147]. See also *LibertyWorks* (2021) 95 ALJR 490 at 512 [94]; 391 ALR 188 at 211.

157 The burden imposed by ss 11 and 12 is "indirect": s 11 is not in terms directed to communications or publications about governmental or political matters. It is facially neutral. Section 12 is further removed. It is not directed to communications; it relevantly prohibits possession of material obtained in contravention of s 8.

158 There was no dispute that the effective burden imposed by ss 11 and 12 must be assessed in light of the burden already placed upon political communication – only the incremental burden requires justification¹⁵⁶. The plaintiffs did not suggest that any existing common law or equitable restrictions – what might be described as "general law" restrictions – must be modified or qualified to conform with the *Constitution* or that any existing statutory restrictions or offences are invalid for impermissibly infringing the implied freedom. They did not challenge ss 7, 8 or 9 of the *Surveillance Devices Act*. As will be seen, the nature and extent of the burden is quite different for those who are trespassers (or complicit in the trespass) and others.

Wider legal context

159 At general law, a person is prohibited from publishing confidential information where they know or ought to know that the information is confidential¹⁵⁷, regardless of whether they themselves received the information in confidence¹⁵⁸. Confidential information "extends to information as to ... personal affairs and private life"¹⁵⁹, but not everything that happens on private property,

156 *Brown* (2017) 261 CLR 328 at 365 [109], 383 [181], 384 [186], 385-386 [188], 408-409 [259], 456 [397], 460 [411], 462 [420]-[421], 463 [424], 502-503 [557]-[558], 506 [563]; *Banerji* (2019) 267 CLR 373 at 420 [89].

157 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 225 [39]. See also *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 438 (referring to breach of confidence lying "in the notion of an obligation of conscience arising from the circumstances in or through which the information was communicated or obtained"); *Wheatley v Bell* [1982] 2 NSWLR 544 at 548; *Minister for Mineral Resources v Newcastle Newspapers Pty Ltd* (1997) 40 IPR 403 at 405; *Retractable Technologies v Occupational and Medical Innovations* (2007) 72 IPR 58 at 74 [61], 77-81 [68]-[86]; Dal Pont, *Law of Confidentiality*, 2nd ed (2020) at 287-288 [14.4]-[14.5]; cf *Attorney-General v Observer Ltd* [1990] 1 AC 109 at 281.

158 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 460; *Breen v Williams* (1996) 186 CLR 71 at 129; *Commissioner of Australian Federal Police v Propend Finance Pty Ltd* (1997) 188 CLR 501 at 567.

159 *Breen* (1996) 186 CLR 71 at 128.

and which the owner of the land would prefer to be unobserved, is private, and thus confidential, in the necessary sense¹⁶⁰. The protection afforded to personal affairs and private life has been said to be based on "respect for human autonomy and dignity"¹⁶¹.

160 It follows from what has been said that if a person does *not* know, and there is no reason why they *ought* to know, that information is confidential, they are not prohibited from publishing it¹⁶². In addition, a person is not prohibited from publishing information about conduct that is itself unlawful. As was said in *Smethurst v Commissioner of the Australian Federal Police*¹⁶³, "there is 'no confidence as to the disclosure of iniquity'; 'information as to crimes, wrongs and misdeeds ... lacks ... 'the necessary quality of confidence'"¹⁶⁴ and as such "prevent[s] one of the constituent elements of the action for breach of confidence from being established"¹⁶⁵.

161 The position is no different where confidential information is "improperly or surreptitiously obtained"¹⁶⁶, as opposed to "imparted in circumstances importing an obligation of confidence"¹⁶⁷. First, it must be recalled, as Gummow J explained in *Smith Kline & French Laboratories (Aust) Ltd v Department of Community Services and Health*¹⁶⁸, that:

160 *Lenah Game Meats* (2001) 208 CLR 199 at 227 [43].

161 *OBG Ltd v Allan* [2008] AC 1 at 77 [275]. See also *Campbell v MGN Ltd* [2004] 2 AC 457 at 472-473 [50]-[51]; *Clubb* (2019) 267 CLR 171 at 195-196 [49].

162 *Wheatley* [1982] 2 NSWLR 544 at 548; *Newcastle Newspapers* (1997) 40 IPR 403 at 405; cf *Observer* [1990] 1 AC 109 at 281.

163 (2020) 94 ALJR 502 at 528 [99], 565 [272]; 376 ALR 575 at 599, 647, quoting *Gartside v Outram* (1856) 26 LJ Ch 113 at 114.

164 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 456.

165 Dal Pont, *Equity and Trusts in Australia*, 7th ed (2019) at 201 [6.290].

166 *The Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 50, quoting *Lord Ashburton v Pape* [1913] 2 Ch 469 at 475.

167 *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47.

168 (1990) 22 FCR 73 at 86.

"confidential information improperly or surreptitiously obtained, on the one hand, and information imparted in confidence, on the other, are treated as two species of the same genus".

162 Second, the fact that information is obtained surreptitiously may indicate that the information was confidential and known to be so¹⁶⁹. Third, third parties – persons who come by confidential information¹⁷⁰ obtained by another person, including by unlawful means, such as trespass – are also prohibited from publishing the confidential information if they know, or ought to know, the manner in which it was obtained¹⁷¹. As Gaudron J stated, "[i]t has been held, both in Australia and in the United Kingdom, that a third person who comes by information innocently may be restrained from making use of it once he or she learns that it was obtained in circumstances involving a breach of confidence"¹⁷².

163 A further, separate, limitation exists where the person sought to be restrained is a trespasser. Section 8(1) of the *Surveillance Devices Act*, which the plaintiffs did not challenge, prohibits the trespass. In such a case, equity may "intervene in aid of [the] right not to suffer a trespass" and "to address harm flowing from the trespass"¹⁷³. Relief against a trespasser, whose trespass here is a criminal offence, as distinct from a third party who knows of but is not complicit in the trespass, does not depend on identifying confidential information¹⁷⁴.

164 The failure of the plaintiffs to challenge s 8 is important. As we have seen, ss 11 and 12 do *not* prohibit a person publishing or possessing information obtained by or from a person who is not a trespasser, such as an employee. That is

169 *Ashcoast Pty Ltd v Whillans* [2000] 2 Qd R 1 at 6.

170 This may include "[a] photographic image, illegally or improperly or surreptitiously obtained, where what is depicted is private": *Lenah Game Meats* (2001) 208 CLR 199 at 224 [34].

171 *Lenah Game Meats* (2001) 208 CLR 199 at 225 [39]; see also 224 [34]-[35].

172 *Johns* (1993) 178 CLR 408 at 460. See also *Breen* (1996) 186 CLR 71 at 129; *Propend Finance* (1997) 188 CLR 501 at 567; *Director of Public Prosecutions (Cth) v Kane* (1997) 140 FLR 468 at 473-474.

173 *Smethurst* (2020) 94 ALJR 502 at 549 [196]; 376 ALR 575 at 626.

174 cf *Lenah Game Meats* (2001) 208 CLR 199, which did not concern relief against a trespasser but concerned only relief against a third party, the Australian Broadcasting Corporation.

unsurprising given the wider legal context¹⁷⁵. And ss 11 and 12 do not prohibit a person standing outside a property and recording conduct taking place on a property. The sections also do not prohibit a person publishing or possessing information in the public domain.

Incremental burden in general terms

165 The incremental burden imposed by s 11 is that it prohibits a publisher, not involved in the unlawful taking of information that bears upon governmental or political matters, but who has knowledge that the information was obtained by trespass, from publishing or communicating a record or report of the carrying on of an activity, where the underlying information is *not* otherwise confidential¹⁷⁶. As the Attorney-General of the Commonwealth submitted, the incremental burden on the implied freedom is in respect of information obtained as a product of trespass that bears upon governmental or political matters and which, even though occurring on private property, is not private in the relevant sense necessary to be protected at general law. Sections 11 and 12, in their operations with s 8, also prohibit the possession and publication of material which itself reveals unlawful conduct, the publication of which would be unlikely to be restrained under general law.

Nature and extent of incremental burden varies

166 As will be evident, the incremental burden differs between, on the one hand, trespassers and those complicit in (or party to) the trespass, and on the other, third parties. Indeed, senior counsel for the plaintiffs accepted in oral argument that there might be a difference in relation to the incremental burden in respect of a trespasser and the "mere recipient" of information.

Trespassers and those complicit in the trespass

167 In respect of trespassers and those complicit in (or party to) the trespass by which the information is obtained, ss 11 and 12 impose an indirect and not insubstantial incremental burden above that which is imposed on them by a combination of the prohibition in s 8 preventing them from obtaining the material in the first instance (which was not challenged by plaintiffs) and the general law. Put in different terms, the indirect and not insubstantial incremental burden on the freedom to communicate on governmental or political matters for trespassers and

175 See, eg, *Corporations Act 2001* (Cth), Pt 9.4AAA; *Public Interest Disclosures Act 1994* (NSW).

176 Or a breach of copyright. See *Lenah Game Meats* (2001) 208 CLR 199 at 246-247 [102]-[103]. See also *Smethurst* (2020) 94 ALJR 502 at 526 [84]; 376 ALR 575 at 595.

those complicit in (or party to) the trespass, such as the plaintiffs, is, generally speaking, limited to, first, situations where they are able to meet an application for an injunction to restrain publication on the grounds that damages would be an adequate remedy, because absent that situation an injunction will likely issue¹⁷⁷, and, second, situations where the material reveals unlawful conduct¹⁷⁸. As to the nature of the burden in respect of such persons, it is significant that the burden relates only to the possession and communication of the product of unlawful conduct (trespass) by those directly involved in or complicit in that conduct.

Third-party publishers – innocent recipients

168 The position of third parties – innocent recipients of the unlawfully obtained information – is different. The incremental burden on the implied freedom for them is different in its nature and its extent. Where the underlying information was obtained by trespass, and the third party knows it was obtained by trespass but was not complicit in that unlawfulness, ss 11 and 12 prohibit that third-party publisher from communicating or possessing any aspect of that information which concerns governmental or political matters¹⁷⁹. That incremental burden, over and above the general law, is indirect but significant.

Second question – legitimate purpose?

169 Section 2A of the *Surveillance Devices Act* has been set out. Relevantly, it states that one of the purposes of the Act is "to ensure that the privacy of individuals is not unnecessarily impinged upon by providing strict requirements around the installation, use and maintenance of surveillance devices"¹⁸⁰. That purpose is directly pursued in s 8. The privacy of the individual which is sought to be protected extends to what goes on within the premises of that

177 *Smethurst* (2020) 94 ALJR 502 at 549 [196]; 376 ALR 575 at 626. See also *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153; *Richardson v Forestry Commission* (1987) 164 CLR 261 at 274-276.

178 *Smethurst* (2020) 94 ALJR 502 at 528 [99], 565 [272]; 376 ALR 575 at 599, 647, quoting *Gartside* (1856) 26 LJ Ch 113 at 114. See also *Corrs Pavey Whiting & Byrne* (1987) 14 FCR 434 at 456; Dal Pont, *Equity and Trusts in Australia*, 7th ed (2019) at 201 [6.290].

179 cf *Defamation Act 2005* (NSW), s 29A (recognising, in a different context, that there may be a public interest in the publication of matters otherwise subject to a prohibition on publication). See also New South Wales, *Defamation Amendment Bill 2020*, Explanatory Note at 10.

180 *Surveillance Devices Act*, s 2A(c).

individual or affects the reputation or esteem in which individuals connected to the premises might be held.

170 But s 2A(c) is a general objects clause. It assists, but is not determinative, in identifying the purpose of every provision in the *Surveillance Devices Act*¹⁸¹. The purpose of s 8 is not limited to protecting the privacy of individuals. It prohibits trespass on or in premises or vehicles involving optical surveillance devices, in order to protect against interference with property. Section 8 has dual, legitimate purposes which necessarily intersect – protection of privacy and dignity and protection of property rights. Those dual purposes are broader than s 2A(c) but are not inconsistent with it.

171 Sections 11 and 12 further the purposes of s 8. Whereas s 8 focuses on trespass, ss 11 and 12 focus on the *consequences* of trespass. There is no disconnect between s 8 and ss 11 and 12. Section 11 operates as a statutory injunction against the use of the fruits of trespass, recognising that to publicise material obtained through trespass furthers the harm to privacy and property recognised by s 8. Section 12 prohibits possession of the fruits of trespass. The dual purposes of ss 11 and 12, like s 8, are protection of privacy and dignity and protection of property rights. Those purposes are legitimate. Contrary to the plaintiffs' submissions, it is no purpose of ss 11 and 12 to disincentivise farm trespass. That elides the purpose and effect of ss 11 and 12¹⁸².

Third question – justified?

172 In addressing the third question – whether the impugned provisions are reasonably appropriate and adapted to advance the legitimate objects of the law – the "three-part test" of suitability, necessity and adequacy, applied by the plurality in *McCloy v New South Wales*¹⁸³, is a tool of analysis that may be of assistance. It is not always (and it is not in this case) necessary or appropriate to undertake all steps of that analysis¹⁸⁴.

173 It is for the government party defending the validity of a law (here, the State of New South Wales) to demonstrate that the burden is justified, including by

181 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [172].

182 cf *McCloy* (2015) 257 CLR 178 at 205 [40]; *Brown* (2017) 261 CLR 328 at 362 [100], 432-433 [322]; *Unions NSW* (2019) 264 CLR 595 at 661 [179]; *Clubb* (2019) 267 CLR 171 at 260 [257].

183 (2015) 257 CLR 178 at 213 [68], 215 [72], 216 [77], 217 [79].

184 *Brown* (2017) 261 CLR 328 at 376 [158]-[159], 378 [163], 417 [279]-[280], 464 [426]-[429], 476-477 [473]; *Clubb* (2019) 267 CLR 171 at 304-305 [389]-[391], 309 [403].

ensuring constitutional facts necessary to support the validity of the law are before the court¹⁸⁵.

Trespassers and those complicit in the trespass

174 If ss 11 and 12, in their operations with s 8, only burdened the political communication of trespassers and those complicit in (or party to) the trespass¹⁸⁶, they would not infringe the implied freedom.

Degree of justification

175 It is important to keep in mind the nature and extent of the burden, as it directly affects the degree of justification required. In this context – trespassers and those complicit in (or party to) the trespass – the burden imposed by ss 11 and 12, in their operations with s 8, is indirect and not insubstantial. Importantly, the burden only relates to the possession and communication of the product of unlawful conduct (trespass) by those directly involved in or complicit in that conduct. A burden of that kind is, in the context of our system of government underpinned by the rule of law, readily justified. The degree of justification required is, therefore, low.

Rational connection

176 The plaintiffs conceded that ss 11 and 12 clearly have a "rational connection" to the purpose of ensuring that the privacy of individuals is not unjustifiably impinged upon by the unlawful use of surveillance devices. That concession is limited to the first of the identified dual purposes. For the reasons explained earlier, ss 11 and 12, in their operations with s 8, also have a "rational connection" to the second and related legitimate purpose.

Burden not "undue"

177 Once it is accepted, as it has been, that the burden is indirect and not insubstantial, that the burden is of a kind that is readily justified, and that ss 11 and 12, in their operations with s 8, are rationally connected to the legitimate purposes

185 *McCloy* (2015) 257 CLR 178 at 201 [24]; *Brown* (2017) 261 CLR 328 at 370 [131]; *Unions NSW* (2019) 264 CLR 595 at 622 [67], 631-632 [93]-[96], 650-651 [151]-[152].

186 cf *Lenah Game Meats* (2001) 208 CLR 199 at 228 [46]-[47]. See also *Bartnicki v Vopper* (2001) 532 US 514.

they seek to serve, no further analysis is required. It is these factors which show why the burden is not "undue"¹⁸⁷.

178 The matter may be explained in this way. The provisions are closely connected to, and advance, their legitimate dual purposes of protection of privacy and dignity and protection of property rights. The indirect and not insubstantial incremental burden in relation to trespassers and those complicit in (or party to) the trespass is readily justified by the legitimate purposes of the provisions. To the extent that they apply to trespassers and those complicit in trespass who may then seek to publish unlawfully obtained information resulting from trespass, ss 11 and 12, in their operations with s 8, are reasonably appropriate and adapted to advance the legitimate dual purposes of protecting the privacy of individuals and protecting property rights from being unjustifiably impinged upon. It is open to Parliament to prevent such persons from benefiting from the fruits of their unlawful conduct.

179 Indeed, if the provisions were not valid in their operation with respect to trespassers and those complicit in trespass, the consequence would be that it would be beyond legislative power to create a statutory tort of privacy that ever speaks to political matters. That cannot be right. It would also mean, for example, that the *Telecommunications (Interception and Access) Act 1979* (Cth) would be invalid insofar as it prohibited publication of an unlawfully obtained intercept if the intercept was of a matter that concerned political issues.

180 Consistently with their identified and legitimate dual purposes, ss 11 and 12, in their operations with s 8, ensure that trespassers and those complicit in trespass are deprived of the fruits of their unlawful conduct. Insofar as they operate in that way, ss 11 and 12 may be seen to adequately and appropriately balance the protection of privacy and dignity and protection of property rights with the implied freedom of political communication.

181 The plaintiffs sought to demonstrate that ss 11 and 12 are invalid by comparing them with legislative provisions enacted in other jurisdictions, particularly Victoria, the Northern Territory, South Australia and Western Australia. The plaintiffs asserted that the mere existence of these alternative schemes was fatal to the constitutional validity of ss 11 and 12. They submitted that the Acts in those other States and the Northern Territory exemplified a workable and valid carve-out which accommodates the implied freedom of political communication, whilst adequately addressing the purposes to which the *Surveillance Devices Act* is directed. In essence, the plaintiffs relied on the fact that there is no "public interest" or "whistleblower" exception to ss 11 and 12 of the *Surveillance Devices Act*, whereas other Acts in other jurisdictions contain exceptions of that kind. They submitted that ss 11 and 12 "could easily be adapted to allow for some political communication in the public interest (at least, where a

187 *Clubb* (2019) 267 CLR 171 at 304 [389].

Judge finds that the publication is in the public interest)" and, failing that, they impose "too great a burden on the possibility for legitimate publication of surveillance device material that blows a whistle".

182 The plaintiffs' argument is to be rejected on two grounds. First, it proceeds from a misunderstanding of the legitimate purposes of ss 11 and 12. The plaintiffs' argument fails to take account of the dual purposes of the provisions. Second, it is neither necessary nor helpful to consider whether the schemes enacted in other States and the Northern Territory are "obvious and compelling" and "equally practicable" alternatives to ss 11 and 12¹⁸⁸. The schemes adopted in different jurisdictions simply reflect that there may be numerous means which the legislature may select from when seeking to achieve the same legitimate purposes¹⁸⁹. That is because the implied freedom accommodates latitude for parliamentary choice in the implementation of public policy¹⁹⁰. The different choices that may be made are reflected in the significantly different approaches adopted in different jurisdictions to regulating the installation, use and maintenance of surveillance devices. The other schemes adopted by other States and the Northern Territory are not obvious and compelling alternatives.

183 None of the other schemes work with or instead of ss 11 and 12, in their operations with s 8. They have different starting points and different purposes and adopt different approaches and structures. The plaintiffs' reliance on the scheme introduced in Victoria is illustrative. It does have a public interest exception controlled, at least to some extent, by the courts¹⁹¹. But a public interest exception would permit publication and communication to a greater extent than the implied freedom would require and, if that was not enough, the exception applies to both lawfully and unlawfully obtained information. None of this is intended to suggest that the adoption of a different scheme, including appropriate exceptions for communicating or publishing unlawfully obtained material, may be constitutionally valid.

184 If the provisions stopped in their operation to trespassers and persons otherwise complicit in trespass, they would not infringe the implied freedom. They would capture a person in the position of Mr Delforce, who has engaged in trespass himself and then possesses surveillance device material obtained in respect of his own trespass (contrary to s 12) and wishes to communicate that material to others (contrary to s 11), as well as a person in the position of Farm

188 *LibertyWorks* (2021) 95 ALJR 490 at 509 [78]; 391 ALR 188 at 207.

189 *cf Unions NSW* (2019) 264 CLR 595 at 638-639 [113].

190 *LibertyWorks* (2021) 95 ALJR 490 at 536 [202]; 391 ALR 188 at 243.

191 *Surveillance Devices Act 1999* (Vic), s 11(2)(b)(i).

Transparency, a corporation which is not physically involved in trespass, but which may be taken to be complicit in the trespass because a director of the corporation is the trespasser, and that director has "significant involvement" in the corporation's operations. Farm Transparency cannot be described merely as an innocent recipient of information obtained by trespass.

Third-party publishers – innocent recipients

- 185 By imposing a blanket prohibition on the disclosure and publication of information obtained in contravention of s 8, ss 11 and 12 extend beyond trespassers and persons complicit in trespass to what might be described as third-party publishers. In their operation with respect to those persons, ss 11 and 12 overreach in a number of respects, such that they are not reasonably appropriate and adapted to advancing their legitimate purposes.

Degree of justification

- 186 In this context the burden imposed by ss 11 and 12, in their operations with s 8, is indirect but significant. Section 11 prohibits a third-party publisher from communicating *any* aspect of the unlawfully obtained information which concerns governmental or political matters. As we have seen, s 11 relevantly applies to publishing and communicating a "report" of the carrying on of an activity. This would prevent, for example, a third party not complicit in the trespass who receives information about the "substance" of an activity where it has come to the person's knowledge as a direct or indirect result of a contravention of s 8 from communicating that information to others (even if not showing the actual footage).

- 187 In their operation with respect to third-party publishers, such as media outlets, who receive information or material and know that it was obtained in contravention of s 8, ss 11 and 12 would operate as a blanket prohibition on possessing and communicating any information or material about governmental or political matters. That is significant. The degree of justification required is, therefore, high.

Rational connection

- 188 Rational connection has been addressed above and the same reasoning applies equally here.

Burden "undue"

- 189 Sections 11 and 12 are blunt instruments. In their terms they would prevent, for example, media outlets communicating *about* footage that reveals unlawful conduct taking place at an abattoir or even unlawful conduct engaged in by the Government. To the extent that ss 11 and 12 apply to third-party publishers they are not reasonably appropriate and adapted to advancing their dual purposes.

190 The earlier criticisms of the plaintiffs' reliance on the schemes adopted in other States and the Northern Territory apply with equal force here.

Answers

191 It is for those reasons that ss 11 and 12, in their operations with s 8, should be read down. Sections 11 and 12 operate in an area where Parliament's legislative power is subject to a clear limitation – the implied freedom of political communication. The sections can and should be read as subject to that limitation¹⁹² and, in their operations with s 8, as having no application to the extent that the provisions place an *unjustified burden* on communication on governmental or political matters. That is the criterion by which the partial operation of the statute is determined. It would not be necessary, and indeed it would be inappropriate, to read ss 11 and 12 as subject to a complete exclusion of political and governmental communication.

192 The questions stated for the opinion of the Full Court should be answered as follows:

1. Does s 11 of the *Surveillance Devices Act* impermissibly burden the implied freedom of political communication?

Answer: Yes, in its operation with s 8, to the extent that it places an unjustified burden on communication on governmental or political matters.

2. If "yes" to Question 1, is s 11 of the *Surveillance Devices Act* severable in respect of its operation upon political communication pursuant to s 31(2) of the *Interpretation Act 1987* (NSW)?

Answer: Yes.

3. Does s 12 of the *Surveillance Devices Act* impermissibly burden the implied freedom of political communication?

Answer: Yes, in its operation with s 8, to the extent that it places an unjustified burden on communication on governmental or political matters.

192 *Victoria v The Commonwealth (Industrial Relations Act Case)* (1996) 187 CLR 416 at 502-503. See also *Tajjour* (2014) 254 CLR 508 at 586 [171]; *Clubb* (2019) 267 CLR 171 at 221 [148], 290 [340].

4. If "yes" to Question 3, is s 12 of the *Surveillance Devices Act* severable in respect of its operation upon political communication pursuant to s 31(2) of the *Interpretation Act 1987* (NSW)?

Answer: Yes.

5. Who should pay costs?

Answer: The defendant.

EDELMAN J.

What this case is not about

193 A concerned member of the public, while present at a political event on private premises without invitation, overhears a conversation between senior members of the Government. The senior members of the Government are discussing their participation in an unlawful enterprise involving wiretapping of Opposition premises, and using the Australian Taxation Office and the Australian Secret Intelligence Service to target political opponents. The concerned member of the public uses a smartphone to make an audio-visual recording of the conversation and provides the recording to a journalist at a national newspaper. The journalist and the editor of the newspaper are aware that the conversation was unlawfully recorded but they want to publish the details to inform the public of these matters of enormous political importance. Even if they cannot publish the information, they want to communicate it to the Australian Federal Police.

194 In these hypothetical circumstances, s 11 of the *Surveillance Devices Act 2007* (NSW), read with s 8, prohibits the journalist or editor from publishing or communicating the information, with penalties of up to \$11,000 and five years' imprisonment¹⁹³. Section 12 prohibits the journalist or editor from even possessing the recording. Would the application of ss 11 or 12 of the *Surveillance Devices Act* to such circumstances demonstrate that those provisions contravene the implied freedom of political communication? Would it make a difference if the recording also exposed the identities of Australian intelligence operatives whose lives would be threatened by any communication or publication of the information?

195 On the one hand, in these hypothetical circumstances the *Surveillance Devices Act* could suppress communication in this country of issues that, in other countries, have been fundamental to government or political matters. On the other hand, an unrestrained freedom may promote an approach that asks: "Why send a reporter to put a foot in the front door when the publisher can be confident that a trespasser with an axe to grind or a profit to be made will be only too willing to break and enter through a back window?"¹⁹⁴

196 The point of these hypothetical examples is to illustrate the vast, unexplored breadth of the plaintiffs' challenge in this special case, extending to circumstances far removed from the factual substratum of this case. The plaintiffs' challenge to ss 11 and 12 of the *Surveillance Devices Act*, on the basis that those sections

193 *Surveillance Devices Act 2007* (NSW), s 11(1) read with *Crimes (Sentencing Procedure) Act 1999* (NSW), s 17.

194 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 319 [305].

contravene the implied freedom of political communication in the *Constitution*, involved no submissions on such hypothetical scenarios or anything like them. Legal issues and factual nuances related to any such hypothetical scenarios were not explored. This Court should be very wary before adjudicating on a broad basis that extends over all such hypothetical cases.

What this case is about

197 I gratefully adopt the description of the circumstances of this special case set out in the reasons of Kiefel CJ and Keane J. It is important to emphasise three features of the special case to demonstrate the issues that properly arise for decision.

198 First, the facts of the special case are concerned only with the operation of ss 11 and 12 of the *Surveillance Devices Act* based upon a contravention of s 8. The facts of the special case do not raise any issue concerning the operation of ss 11 and 12 based upon a contravention of ss 7, 9 or 10, which prohibit the installation, use and maintenance of a listening device, a tracking device, or a data surveillance device.

199 The second feature of the facts of the special case is that they concern only the communication or publication of unlawfully obtained information by trespassers and those complicit in the trespass under s 8 of the *Surveillance Devices Act*. The facts do not concern third party recipients of information such as journalists or editors, or any other third parties who receive the information with or without knowledge of the unlawful manner in which it was obtained. In that respect, the circumstances of this case are very different from those in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*¹⁹⁵, where it was not alleged that the appellant broadcaster "was implicated in or privy to the trespasses upon the premises" or "knowing[ly] participat[ed] ... in what is alleged to have been the relevant wrongdoing"¹⁹⁶.

200 The goals of the first plaintiff, Farm Transparency International Ltd, and the second plaintiff, Mr Delforce, as a director of the first plaintiff, include educating the public about cruelty to non-human animals and advocating for law reform, including by providing evidence and reporting on farming practices. Mr Delforce has dedicated his life to "working towards alleviating the suffering of animals through public education and efforts to change the law". He has been a director of Farm Transparency since its incorporation and an officer of its predecessor corporation since 2014.

195 (2001) 208 CLR 199.

196 (2001) 208 CLR 199 at 247-248 [104].

201 Mr Delforce gives numerous examples of circumstances in which Farm Transparency or its predecessor corporation of which he was an officer have published audio-visual footage of animal suffering. He speaks about images and footage from 21 piggeries, a turkey farm, a duck farm, a turkey abattoir, a cage egg facility, two "farm" eggs facilities, and two "pet food" facilities. In every instance, Mr Delforce was the person who took the footage or was complicit in, or aware of, the process of taking the footage or the installing of cameras on the premises.

202 On each of the numerous occasions when Mr Delforce published his recordings of non-human animal cruelty to which he refers in his affidavit, Mr Delforce used Farm Transparency or its predecessor corporation, and their websites, as a vehicle to publish the photographs and audio-visual footage of non-human animal cruelty. Farm Transparency wishes to continue to publish information, including video recordings, that show non-human animal cruelty practices without the burden imposed by the *Surveillance Devices Act*.

203 To the extent that the special case discloses any trespasses by Mr Delforce in contravention of s 8 of the *Surveillance Devices Act*, the natural inference is that those trespasses occurred as part of a common design, or sharing a common purpose, with Farm Transparency, of which he has always been a director, in order to obtain recordings of cruelty to non-human animals for publication by Farm Transparency. Even if Mr Delforce's actions were not, and will not be, undertaken as an agent of Farm Transparency¹⁹⁷ or able to give rise to joint liability based on a common purpose¹⁹⁸, a possible inference from the material in the special case is that Farm Transparency is, or will likely be, an accessory before the fact¹⁹⁹ and potentially liable for an offence under s 8. At the least, in the circumstances of past contraventions described by Mr Delforce, Farm Transparency or its predecessor corporation would be, to use the language of Gleeson CJ, "complicit" in any trespass under s 8²⁰⁰.

197 *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 514; *Northern Land Council v Quall* (2020) 94 ALJR 904 at 921 [82]; 383 ALR 378 at 398. See also *Criminal Procedure Act 1986* (NSW), s 10(1).

198 *McAuliffe v The Queen* (1995) 183 CLR 108 at 114; *Miller v The Queen* (2016) 259 CLR 380 at 388 [4]; *IL v The Queen* (2017) 262 CLR 268 at 283 [30].

199 *McAuliffe v The Queen* (1995) 183 CLR 108 at 113-114; *Osland v The Queen* (1998) 197 CLR 316 at 341-343 [71]-[73]; *IL v The Queen* (2017) 262 CLR 268 at 283 [30].

200 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 228 [46].

204 The third feature of the facts of the special case is that there has been no finding of any court, nor was there any submission either in writing or orally, that established the unlawfulness of any activity depicted in a record that was obtained or that might be obtained. No law was identified in submissions by the plaintiffs that might potentially have made such activities unlawful and the State of New South Wales thus had no opportunity to address the nature or scope of any unlawful activity on private property that might be disclosed by the plaintiffs.

205 Mr Delforce has been involved in many incidents of covert recording of farming activities involving considerable suffering of non-human animals. Some images from such recordings were exhibited to the affidavit of Mr Delforce, which was part of the special case. They reveal shocking cruelty to non-human animals. They may very well have been unlawful as well as immoral. But even apart from the lack of submissions about the basis for any illegality, the special case does not assert that any of the recorded activities had been found to be unlawful.

206 Many of the recordings made by Mr Delforce were not referred to the police or to the Royal Society for the Prevention of Cruelty to Animals (RSPCA) because he considered that the practices, whilst cruel, were not illegal. On the occasions that Mr Delforce did refer recordings to the police or to the RSPCA, there was no successful prosecution. Therefore, on the facts stated and in light of the manner in which the argument developed, this special case was presented on the basis that the activities, albeit undeniably cruel, were not established to be unlawful.

207 The circumstances of the special case therefore raise the question of whether the implied freedom of political communication is contravened by the operation of ss 8, 11 and 12 of the *Surveillance Devices Act* in prohibiting trespassers and those complicit in a trespass from publishing or communicating information exclusively obtained from that trespass and which does not reveal unlawful conduct. The answer is that ss 8, 11 and 12 of the *Surveillance Devices Act* are not invalid in their application to such general circumstances.

Restraint in considering the application of the challenged provisions

208 In *Knight v Victoria*²⁰¹, this Court considered the validity of s 74AA of the *Corrections Act 1986* (Vic) in circumstances in which doubt was raised about the valid application of that section to judicial officers who are members of the Adult Parole Board. But, as the *Corrections Act* permitted, no current judicial officer had been involved in any consideration of Mr Knight's application. This Court held that s 74AA was not invalid in the circumstances before it. Even if it were invalid in circumstances in which the Adult Parole Board was constituted by a current judicial officer, it could be disapplied in that application. Section 6 of the *Interpretation of Legislation Act 1984* (Vic), which mirrors s 15A of the *Acts*

201 (2017) 261 CLR 306.

Interpretation Act 1901 (Cth), would avoid any invalidity because "the application of that provision to other persons, subject-matters or circumstances shall not be affected". The Court said that "[i]t is not the practice of the Court to investigate and decide constitutional questions unless there exists a state of facts which makes it necessary to decide such a question in order to do justice in the given case and to determine the rights of the parties"²⁰².

209 The caution enunciated in *Knight* was said to mean that it is "ordinarily inappropriate for the Court to be drawn into a consideration of whether a legislative provision would have an invalid operation in circumstances which have not arisen and which may never arise", provided that the hypothetical application of the provision could be disapplied if it were found to be invalid²⁰³. The qualifier "ordinarily" was an error. It stated the restriction too strictly²⁰⁴. It neglected the role of this Court to deal with cases before it by establishing principles that apply, at least to some extent, more generally than in their immediate application to the party before the Court. On the other hand, it is an error at the other extreme to assume that because a party has standing to raise a question, so that it is possible for the question to be addressed, the party is entitled to an adjudication of the totality of its claim, extending to all asserted applications of a law, whether or not that party is affected by those applications. There is a basic difference between rules of standing, which make an adjudication possible, and pragmatic rules concerning the extent to which adjudication is appropriate²⁰⁵. The difficult question in many cases will be the identification of the appropriate level of generality, between the particular application to the party before the Court and all possible applications, at which to adjudicate upon validity²⁰⁶.

210 It is appropriate in this case for the Court to adjudicate upon the validity of ss 11 and 12 only in their application with s 8, which prohibits installing, using or maintaining an optical surveillance device. In that application with s 8, it is also appropriate to consider ss 11 and 12 in the generality of circumstances involving

202 (2017) 261 CLR 306 at 324 [32], quoting *Lambert v Weichelt* (1954) 28 ALJ 282 at 283.

203 (2017) 261 CLR 306 at 324 [33].

204 *Private R v Cowen* (2020) 94 ALJR 849 at 886 [158]; 383 ALR 1 at 44.

205 *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 852-853 [100]; 393 ALR 551 at 574.

206 See eg *Palmer v Western Australia* (2021) 95 ALJR 229 at 238 [25], 271 [202], 274-277 [223]-[234]; 388 ALR 180 at 187, 229-230, 234-238. Cf (2021) 95 ALJR 229 at 248 [90], 249 [93]; 388 ALR 180 at 201-202.

the publication or communication by trespassers or those complicit in the trespass of a record or report of lawful activities on private premises or in a vehicle²⁰⁷.

211 No submissions have been made upon many of the applications of ss 11 and 12 of the *Surveillance Devices Act* beyond these circumstances that are relevant to the parties. A determination of the validity of ss 11 and 12 in other potential applications would not merely require this Court to speculate on circumstances that are not before it and have not been the subject of any argument such as the difficult examples raised at the start of these reasons, which are entirely hypothetical in the context of the facts before this Court. A determination of the validity of ss 11 and 12 beyond their application with s 8 in the circumstances of this case would also require this Court to speculate upon legal principles which have not been the subject of any argument²⁰⁸.

212 An example of a legal principle that was not the subject of any argument is the precise extent to which the pre-existing law, including duties of confidence, encompasses or extends beyond the prohibitions in ss 11 and 12 of the *Surveillance Devices Act*. To that extent, the prohibitions regulate conduct in which there is no existing freedom to engage. For instance, does the existing law of confidence impose a duty upon third parties not to communicate or publish any personal information? What is the scope of "personal" information? Would that duty extend to circumstances where the third party has no actual knowledge that the information is personal, although they ought reasonably to have known that it was confidential?

213 Although it is not appropriate to do so, it would be possible for this Court to adjudicate more broadly upon the questions before it in this case. It would be possible to adjudicate on a basis that extends to a scenario in which Farm Transparency, like the journalist and the editor of the newspaper discussed at the commencement of these reasons, publishes or communicates information in contravention of ss 11 or 12, which information was obtained by a breach of s 8 in which it was not complicit. But the special case does not indicate whether Farm Transparency intends to engage in those acts *without* being complicit in a contravention of s 8, or the manner in which it would do so. There is nothing in the special case to indicate what those circumstances of non-complicity might be, how they might arise, and whether they are likely to occur. If this Court were to adjudicate on a basis that extended to such scenarios then it would be dispensing advice to Farm Transparency about hypothetical scenarios that Farm Transparency has not raised and without any knowledge of the circumstances in which those

207 *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 854 [107]; 393 ALR 551 at 576.

208 *Mineralogy Pty Ltd v Western Australia* (2021) 95 ALJR 832 at 853 [105], 854 [107]; 393 ALR 551 at 575, 576.

scenarios might arise. And to do so, this Court would also need to consider legal issues that have not been argued.

214 One speculation might be that a person who has obtained a record or report in contravention of s 8, without prior complicity of Farm Transparency, might approach Farm Transparency seeking to have the record or report published. A further speculation might be that Farm Transparency might wish to publish that record or report. But is such a scenario likely? And what would the circumstances of that scenario be in order to assess the practical effect on it of the *Surveillance Devices Act*? Would an unrelated third party trespasser be more likely to seek to publish a record or report of lawful, rather than unlawful, activities through Farm Transparency without any complicity of Farm Transparency in the trespass? Are there features or advantages of the Farm Transparency online platform that would provide any advantage to the unrelated third party over personal online publication or through an established media outlet with larger outreach? Would Farm Transparency be able to verify the record or report received from an unrelated third party? Would Farm Transparency exercise any caution in scrutinising any record or report before publishing? Has this ever happened before?

215 The breadth of the relief sought by the plaintiffs would also require this Court to speculate on legal issues related to confidential information that have not been argued in order to decide their application to a scenario that has not been raised and which might never arise. The Court is not required to do so, and should not do so, if the words of ss 11 and 12 can be read down, severed, or disapplied from such scenarios.

216 As to the circumstances of the general nature of those before the Court, the words of ss 11 and 12 of the *Surveillance Devices Act* cannot be "read down"²⁰⁹ as though they exclude unlawful conduct pursuant to ss 7, 9 or 10. Nor could they be read down, in relation to their operation based on s 8, to exclude third parties who were not complicit in the trespass, or private conversations on government or political matters concerning unlawful conduct, or unlawful private activities that concern government or political matters. To read a provision "down" it must at least be open to be "read" in that way. It is not possible to read down ss 11 and 12 in those ways because it is not open, even on the most strained interpretation, to read those provisions as though their meaning was confined by exceptions drafted broadly in those terms. To read down those provisions to produce such a meaning "would not be judicial interpretation but judicial vandalism"²¹⁰. Nor are there any independent words of ss 11 and 12 that can be relevantly severed to achieve these

209 See *Clubb v Edwards* (2019) 267 CLR 171 at 313-314 [416]-[417].

210 *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at 883 [30].

exceptions by "striking out or disregarding words that are in the section" from the "severable" remainder²¹¹.

217 It is possible, however, for ss 11 and 12 to be partially disapplied to the extent that they are invalid in any or all of: (i) their operations with ss 7, 9 or 10; (ii) their applications to persons who were not a party to the trespass under s 8; and (iii) their applications to information or recordings that concern unlawful activity of a governmental or political nature. If it were necessary to disapply the *Surveillance Devices Act* from such circumstances, which are not raised in this case, then it would be possible to do so²¹².

218 It is necessary to emphasise that to confine adjudication of the plaintiffs' claim to the application of the law to the facts generally before the Court is, emphatically, not to deny relief to the plaintiffs due to past contraventions of, or complicity in contraventions of, s 8. Just the opposite: the adjudication of the plaintiffs' claim is confined to the appropriate bounds based upon the material before the Court which concerns past and possible future contraventions and complicity in contraventions.

The interpretation of ss 8, 11 and 12 of the *Surveillance Devices Act*

219 I agree with the interpretation of ss 8, 11 and 12 as set out in the reasons of Kiefel CJ and Keane J²¹³, together with the reasons of Gordon J²¹⁴. That interpretation may have significant effects upon third party recipients of recordings, like those considered at the outset of these reasons, in circumstances where such scenarios have not been the subject of submissions and the interests of the third parties are not represented before this Court. For the purposes of this special case, it suffices to illustrate two further, and significant, constraints upon the operation of ss 8, 11 and 12 that arise from that interpretation.

220 First, the scope of application of ss 11 and 12 is confined by the twin requirements that are expressed or implied, being (i) an intention to publish or communicate the record or report, or to possess the record, and (ii) knowledge that the information is a direct or indirect result of the use of an optical surveillance device in contravention of s 8.

211 *The Federated Amalgamated Government Railway and Tramway Service Association v The New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488 at 546-547.

212 *Interpretation Act 1987* (NSW), s 31(2).

213 At [22]-[25].

214 At [127]-[151].

221 Contrary to the submissions of the plaintiffs, not every recipient of a surreptitious recording of an activity on premises will know that the recording was made in breach of s 8 of the *Surveillance Devices Act*. Indeed, without more, the mere receipt of such a recording will rarely be sufficient to infer such knowledge, since the recording could have been made covertly by any visitor or employee on the premises. For example, a visitor or employee who enters farming property by invitation or for work purposes will rarely become a trespasser merely because they also have a purpose of obtaining surreptitious recordings²¹⁵.

222 Secondly, ss 11(3) and 12(2)(c) further confine the scope of operation of ss 11(1) and 12(1) respectively to circumstances where the knowledge or record has been obtained exclusively by a contravention of Pt 2, including by trespass within the meaning of s 8. Section 11(3) exempts from the prohibition in s 11(1) the communication or publication of knowledge that is also obtained by means that are not contrary to Pt 2. For instance, if a person obtains knowledge of non-human animal mistreatment practices by a recording that is contrary to s 8, but obtains the same knowledge from an employee, then s 11(3) permits the communication or publication of the information received from the employee. Section 12(2)(c) provides a similar exemption from the prohibition in s 12(1), so that in the same example the person would not commit a possession offence under s 12(1).

The incremental burden on the freedom of political communication

223 The implied freedom of political communication is a constitutional limit upon legislative power to constrain the liberty of the people to communicate on government or political matters. Where the general law validly denies liberty of communication on particular political matters, then any law that imposes a prohibition upon political communication can only incrementally burden the implied freedom in so far as it extends beyond the existing prohibition. For that reason, this Court has consistently denied that the freedom implied in the *Constitution*, as a limit on legislative power, prevents a Parliament from regulating communications that a person is *not* free to make²¹⁶. To recognise otherwise would transmogrify the constitutional protection of a freedom into a constitutional claim right.

224 The consistency of ss 8, 11 and 12 with the implied freedom of political communication therefore falls to be determined by reference to the incremental burden that those provisions, in their relevant application, impose upon the existing

215 *Roy v O'Neill* (2020) 95 ALJR 64 at 78-79 [72]-[73]; 385 ALR 187 at 204-205.

216 *Levy v Victoria* (1997) 189 CLR 579 at 595, 622, 625-626, approved in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 223-224 [107]-[108], 246 [184], 298 [337], 303-304 [354]; *Brown v Tasmania* (2017) 261 CLR 328 at 365 [109], 408 [259], 456 [397], 503-504 [559].

liberty of political communication. The most significant area of the relevant operation of ss 8, 11 and 12 of the *Surveillance Devices Act* in which there is no liberty of political communication is where the publication or communication of the information would be a breach of confidence.

Three categories of the action for breach of confidence

225 The equitable wrong of breach of confidence is an overarching doctrine. It can only be understood by appreciating that it encompasses three overlapping and closely related categories concerning information that is private, in the sense of information that is not publicly available. The first category is private information that arises in the course of a relationship of confidence. The second category is private information that is secret. The third category is private information that is personal in the sense that it concerns the dignity of an individual.

(1) Private information communicated in a relationship of confidence

226 Perhaps the longest-established category of action for breach of confidence lies in a duty upon a recipient of private information to respect the confidence in which the information was known to have been imparted during service for another or in the course of a relationship with another²¹⁷. The information must bear the character of being confidential, but that character is not narrowly defined. It can arise from any objective assumption of responsibility, whether contractual or not, to maintain confidence in respect of information expressly or impliedly imparted as confidential. Such an assumption of responsibility can be recognised in any relationship and can survive the termination of a contract if that was objectively intended²¹⁸. The examples in the authorities of such relationships are as varied as information provided by a patient to a doctor²¹⁹, by Indigenous Australians to an anthropologist²²⁰, or by an employer to an employee²²¹.

217 *Johns v Australian Securities Commission* (1993) 178 CLR 408 at 426-427, quoting *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 214. See also *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 437-438.

218 See eg *Prince Jefri Bolkiah v KPMG (a firm)* [1999] 2 AC 222 at 235.

219 *Breen v Williams* (1996) 186 CLR 71.

220 *Foster v Mountford and Rigby Ltd* (1976) 14 ALR 71.

221 *N P Generations Pty Ltd v Feneley* (2001) 80 SASR 151.

(2) Private information that is secret

227 Another well-established basis for an action for breach of confidence is where a recipient comes into possession of information that is known to be secret, even if the information is not imparted in confidence in the course of a relationship. As a "matter of plain English 'confidential' means that which is intended to be kept secret, and 'confidentiality' is the state of keeping something secret or private"²²². As Lord Goff said in his masterly speech in *Attorney-General v Guardian Newspapers Ltd [No 2]*²²³:

"[I]n the vast majority of cases, in particular those concerned with trade secrets, the duty of confidence will arise from a transaction or relationship between the parties ... But it is well settled that a duty of confidence may ... include certain situations, beloved of law teachers – where an obviously confidential document is wafted by an electric fan out of a window into a crowded street, or where an obviously confidential document, such as a private diary, is dropped in a public place, and is then picked up by a passer-by. I also have in mind the situations where secrets of importance to national security come into the possession of members of the public".

228 The concept of a "secret" is somewhat elastic. Lord Franks, who inquired into s 2 of the *Official Secrets Act 1911* (UK)²²⁴, is said to have remarked that an Oxford secret is one that is told only to one person at a time. In *Ansell Rubber Co Pty Ltd v Allied Rubber Industries Pty Ltd*²²⁵, Gowans J spoke of a "sufficiently substantial element of secrecy" so that, "except by the use of improper means, there would be difficulty in acquiring the information".

(3) Private information that is personal

229 The "secret" shades into the "personal". Once it is accepted, as it should be, that the quality of confidence extends to information that is "significant, not necessarily in the sense of commercially valuable ... but in the sense that the preservation of its confidentiality or secrecy is of substantial concern to the plaintiff"²²⁶, no principled basis can exist for treating personal information differently from secret information where both are private.

222 *Murray v Turcan Connell* WS 2019 SC 403 at 417 [40].

223 [1990] 1 AC 109 at 281.

224 1 and 2 Geo 5 c 28.

225 [1967] VR 37 at 39, 50.

226 *Moorgate Tobacco Co Ltd v Philip Morris Ltd [No 2]* (1984) 156 CLR 414 at 438.

230 Personal information should have no less protection than a trade or other secret merely because it is not of commercial value to a plaintiff. Personal information includes information and images about the personal struggle of a fashion model with drug addiction²²⁷, the personal details of someone's consensual sexual activity²²⁸ or other "private act"²²⁹, a private wedding²³⁰, or a man in his underpants in his bedroom²³¹. As Gummow J said in *Breen v Williams*²³², the misuse of confidential information that can be restrained in equity is not limited to trade secrets but "extends to information as to the personal affairs and private life of the plaintiff, and in that sense may be protective of privacy".

231 The utility, however, of a separate category concerning personal information may lie in the potential wrongfulness of communicating or publishing such information even where, to some degree, it is in the public domain. It may be that personal information should be protected not merely where the information is secret, but also where further disclosure would compromise foundational interests of human dignity and autonomy²³³. In *PJS v News Group Newspapers Ltd*²³⁴, Lord Neuberger (with whom Lady Hale, Lord Mance and Lord Reed agreed) quoted with approval from the following statement of Eady J²³⁵:

"It is fairly obvious that wall-to-wall excoriation in national newspapers ... is likely to be significantly more intrusive and distressing for those concerned than the availability of information on the Internet or

227 *Campbell v MGN Ltd* [2004] 2 AC 457.

228 *Giller v Procopets* (2008) 24 VR 1.

229 *Hellewell v Chief Constable of Derbyshire* [1995] 1 WLR 804 at 807; [1995] 4 All ER 473 at 476. See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 224 [34].

230 *Douglas v Hello! Ltd* [2001] QB 967. See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 225 [37].

231 *Donnelly v Amalgamated Television Services Pty Ltd* (1998) 45 NSWLR 570. See also *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 230-231 [54]-[55].

232 (1996) 186 CLR 71 at 128.

233 See *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 226 [43], 256 [125].

234 [2016] AC 1081 at 1109 [61].

235 *CTB v News Group Newspapers Ltd* [2011] EWHC 1326 (QB) at [24].

in foreign journals to those, however many, who take the trouble to look it up ... For so long as the court is in a position to prevent *some* of that intrusion and distress, depending upon the individual circumstances, it may be appropriate to maintain that degree of protection." (emphasis in original)

232 Whatever might be the boundaries of this category of confidential information, its protection extends beyond the secrecy of the information to the dignity of the individual. The use of the action for breach of confidence in this category to protect the privacy and dignity of the individual is not novel. In 1849, in *Prince Albert v Strange*²³⁶ the Lord Chancellor referred to an earlier decision of Lord Eldon to the effect that the court would restrain the publication, in the king's lifetime, of a diary kept by one of the king's physicians of what they had seen and heard about the health of the king. That decision was one of the foundations of the law of privacy in the United States²³⁷.

Extending breach of confidence?

233 In *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*²³⁸, this Court considered whether principles concerning breach of confidence extended to the publication of a film showing cruelty to possums which had been obtained "by unlawful entry and secret surveillance" although the activities recorded were not "secret", and nor was a relationship of confidence "imposed upon people who might see the operations". The different reasons given by members of this Court, Callinan J dissenting, for allowing the appeal and refusing relief illustrate the different views concerning the boundaries of the action for breach of confidence.

234 The most restrictive approach, at least in relation to individuals, was taken by Gleeson CJ, who considered that the protection afforded by the law concerning breach of confidence did not extend to every activity done on private property. His Honour said that the activities had been conducted on private property, but had not been shown to be private in any other sense²³⁹. Gleeson CJ said that the foundation of much of the privacy protection afforded by the action for breach of confidence is "human dignity"²⁴⁰. Although Gleeson CJ did not express a final conclusion, he

236 (1849) 1 Mac & G 25 at 46 [41 ER 1171 at 1179].

237 See Warren and Brandeis, "The Right to Privacy" (1890) 4 *Harvard Law Review* 193 at 201-205. See also Dal Pont, *Law of Confidentiality*, 2nd ed (2020) at 73-74 [4.26]-[4.27].

238 (2001) 208 CLR 199 at 221 [24]-[25].

239 (2001) 208 CLR 199 at 224 [35].

240 (2001) 208 CLR 199 at 226 [43].

nevertheless suggested that the action for breach of confidence might, in some circumstances, protect the privacy of a corporation²⁴¹.

235 A potentially broader approach to breach of confidence was taken by Gummow and Hayne JJ, with whom Gaudron J relevantly agreed²⁴², although their approach was narrower in respect of the persons entitled to rely on a breach of confidence. Their Honours referred to circumstances of breach of confidence as potentially including "the disclosure of private facts and unreasonable intrusion upon seclusion"²⁴³ but denied the respondent the ability to rely upon those circumstances because it was a corporation rather than a natural person²⁴⁴.

236 Kirby J took an even less restrictive approach than Gummow and Hayne JJ (Gaudron J agreeing), considering that the disclosure of information could be restrained simply on the basis that it was obtained "illegally, tortiously, surreptitiously or otherwise improperly"²⁴⁵. His Honour only allowed the appeal on the basis that an injunction should have been refused as a matter of discretion²⁴⁶. Callinan J took the least restrictive approach and would have upheld the restraint and dismissed the appeal²⁴⁷.

237 At its narrowest, the present state of the law concerning the third category of breach of confidence is, therefore, that it can extend to all private information where human dignity is concerned. In that category, it cannot be conclusively said that it extends to corporations or that human dignity would be compromised by the communication of any private information.

238 There are other boundaries of the law concerning the obligation of confidence that are also unsettled. For instance, there remains dispute about the extent to which the obligation is imposed upon persons who are not primarily liable for a breach of confidence and do not know that the information is confidential. Some cases suggest that the obligation extends to a recipient who could reasonably

241 (2001) 208 CLR 199 at 226-227 [43].

242 (2001) 208 CLR 199 at 232 [61].

243 (2001) 208 CLR 199 at 256 [125]. See also at 255 [123].

244 (2001) 208 CLR 199 at 257-258 [129]-[132].

245 (2001) 208 CLR 199 at 272 [170].

246 (2001) 208 CLR 199 at 288 [220]-[221].

247 (2001) 208 CLR 199 at 341 [353].

have known that the information was confidential²⁴⁸ and potentially even to "innocent" third parties²⁴⁹, arguably creating a duty in both cases to consider whether information is confidential before communicating or publishing it. Other decisions appear to deny this, other than in circumstances of wilful blindness or where a person has been told that information is in fact confidential²⁵⁰. And others have expressly, and carefully, avoided the controversy of "the extent to which actual knowledge is necessary" beyond circumstances of wilful blindness²⁵¹. The answer to this question may also depend upon the category of breach of confidence that is involved, particularly because an objective assumption of responsibility creates duties independently of subjective knowledge²⁵².

239 The boundaries of the public interest defence to breach of confidence are also not yet settled. One aspect of that defence is sometimes said to be the principle that a person cannot be made "the confidant of a crime or a fraud"²⁵³. As Gibbs CJ observed in *A v Hayden*²⁵⁴, that defence has been expanded in England to include misconduct generally. However, his Honour did not decide whether that expansion should be embraced in Australia. It has thus been said that the extent to which the defence applies in Australia "is not clear"²⁵⁵. To the extent that the defence operates, it may be doubted whether it permits disclosure to the world at large, or

248 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 225 [39]. See also *Minister for Mineral Resources v Newcastle Newspapers Pty Ltd* (1997) 40 IPR 403 at 405; *Retractable Technologies v Occupational and Medical Innovations* (2007) 72 IPR 58 at 74 [61], 77-81 [68]-[86].

249 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199 at 295 [242], referring to *Lenah Game Meats Pty Ltd v Australian Broadcasting Corporation* (1999) 9 Tas R 355 at 388-389 [75]-[76].

250 *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556 at 1563 [25]-[26], 1565 [39]; [2013] 4 All ER 781 at 789, 791; *Earl v Nationwide News Pty Ltd* [2013] NSWSC 839 at [17].

251 *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 281; *Hunt v A* [2008] 1 NZLR 368 at 384-385 [92]-[94]. Compare *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41 at 47-48.

252 See eg *Wheatley v Bell* [1982] 2 NSWLR 544 at 548.

253 *Gartside v Outram* (1856) 26 LJ Ch 113 at 114.

254 (1984) 156 CLR 532 at 544-545.

255 *AG Australia Holdings Ltd v Burton* (2002) 58 NSWLR 464 at 513 [177].

to a narrower audience – for example, relevant law enforcement authorities²⁵⁶. Even the foundations of the defence, based upon a case that has been reported in significantly different terms²⁵⁷, have been questioned²⁵⁸.

240 It is unnecessary to resolve these issues in this case because the application of the implied freedom of political communication in relation to the *Surveillance Devices Act* can be resolved on the basis of the existing boundaries of the equitable obligations of confidence. The equitable doctrine must develop consistently with the implied constitutional freedom of political communication²⁵⁹. But its present boundaries are entirely consistent with that constitutional freedom. In particular, representative democracy does not provide a licence to disregard express or implied undertakings of confidence or to reveal trade or other secrets. Indeed, representative democracy can be enhanced by the insistence upon undertakings of confidence on matters that relate to the core of political decision-making such as rules concerning the secrecy of recent Cabinet discussion.

241 It is no more necessary for representative democracy to require, in the name of political communication, a liberty to impair a person's dignity by the communication of private and personal information concerning lawful activities that might be characterised in the broad sense as political, than it is for the law to provide a liberty to assault a person or to trespass on a person's property in order to communicate about matters that could broadly be described as political.

The validity of ss 8, 11 and 12 in their relevant application

The extent of the burden upon political communication

242 In their relevant application to the publication or communication by a person involved in a trespass of a record, obtained by the trespass, showing the carrying on of a lawful activity on private property or in a vehicle, ss 8, 11 and 12 of the *Surveillance Devices Act* extend beyond the existing law concerning the communication or publication of confidential information. But not far beyond.

243 The complicity of Mr Delforce and Farm Transparency for any breach of ss 11 and 12 arising from a trespass by Mr Delforce contrary to s 8 has a close parallel with the joint liability of persons who are principals of an agent acting in breach of confidence or who have a common purpose that includes breach of

256 *Attorney-General v Guardian Newspapers Ltd [No 2]* [1990] 1 AC 109 at 282-283.

257 *Gartside v Outram* (1856) 26 LJ Ch 113; 5 WR 35; 3 Jur (NS) 39; 28 LT (OS) 120.

258 *Corrs Pavey Whiting & Byrne v Collector of Customs (Vic)* (1987) 14 FCR 434 at 452-456.

259 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 566.

confidence²⁶⁰. But, as explained above, a communication of the type of non-human animal agriculture information described in the special case as having been recorded, and being likely to be recorded, by trespass in which Farm Transparency was complicit was only recognised as capable of protection by obligations of confidence in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* by Kirby J and Callinan J. The other members of the Court treated such circumstances as falling outside the existing law of breach of confidence, either because they are not sufficiently private (Gleeson CJ), or because they might concern activities of a corporation rather than a natural person (Gummow and Hayne JJ, Gaudron J agreeing).

244 In their relevant application, ss 8, 11 and 12 of the *Surveillance Devices Act* involve an incremental extension of the general law of confidentiality. Although the provisions, unlike equity, do not involve a discretion to refuse to restrain the activity, in both cases the person seeking to communicate or publish has no liberty to do so; other remedies are available in equity. Sections 8, 11 and 12 do, however, extend the prohibition upon communication or publication in two respects. First, they extend to lawful activities on private property or in a vehicle that are not necessarily confidential within the present boundaries of obligations of confidence. Secondly, they extend to circumstances where those activities are carried on by corporations, albeit through human agents.

245 In those two respects, ss 8, 11 and 12 of the *Surveillance Devices Act*, in their relevant application, impose a burden on the freedom of political communication by restraining those who are complicit in a trespass from revealing private information about lawful activities exclusively obtained from their trespass.

The purposes of ss 11 and 12, read with s 8, of the Surveillance Devices Act

246 Section 2A of the *Surveillance Devices Act* provides for its objects. Apart from objects concerning law enforcement agencies, an object is "to ensure that the privacy of individuals is not unnecessarily impinged upon by providing strict requirements around the installation, use and maintenance of surveillance devices". This express general statement of statutory purposes is necessarily more general than the purpose of a particular provision, which a court is required to characterise with greater specificity; indeed, the general statement of the purposes of an Act might not even touch upon the particular purposes of some provisions²⁶¹.

260 *Vestergaard Frandsen A/S v Bestnet Europe Ltd* [2013] 1 WLR 1556 at 1563 [26]; [2013] 4 All ER 781 at 789. See also *Construction, Forestry, Maritime, Mining and Energy Union v Personnel Contracting Pty Ltd* (2022) 96 ALJR 89 at 112 [82]; 398 ALR 404 at 425.

261 *Unions NSW v New South Wales* (2019) 264 CLR 595 at 657 [172].

The appropriate approach to ascertaining the purpose of particular provisions, as the Solicitor-General of the State of Queensland submitted, is that of the Supreme Court of Canada in *R v Moriarity*²⁶², where Cromwell J said that if the purpose is "articulated in too general terms, it will provide no meaningful check on the means employed to achieve it" but if it is "articulated in too specific terms, then the distinction between ends and means may be lost".

247 The term "privacy" in s 2A is used in a wide sense to include all intrusions by trespass and all of their consequences. The reference to the privacy of "individuals" cannot confine the purposes of ss 11 and 12, which include protection against "privacy" intrusions on property that is owned by a corporation. As Gordon J explains²⁶³, the more specific purposes of ss 11 and 12, read with s 8, are the protection of privacy and dignity and the protection of property rights. The purposes of ss 11 and 12 should not be characterised in such specific terms as being to disincentivise farm trespass. That would confuse the purpose and the means of achieving it.

The structured proportionality enquiry

248 There was no dispute that the purposes of ss 11 and 12 of the *Surveillance Devices Act*, read with s 8, are legitimate, in the sense that it is no purpose of those provisions to burden the freedom of political communication. The issue is whether the legitimate purposes can justify the effect of those provisions – or, perhaps more accurately, the expected effect of those provisions²⁶⁴ – in burdening the freedom of political communication.

249 Different views have been expressed in this Court concerning the party who bears the onus either of establishing a law's lack of proportionality or of justifying a law as proportionate²⁶⁵. But since the party supporting the law is likely to be the party with the most ready access to proof of the anticipated legal and practical effect of the law, the better view is that it is that party who must justify the burden once it is established²⁶⁶.

262 [2015] 3 SCR 485 at 498-499 [28].

263 At [171].

264 *Clubb v Edwards* (2019) 267 CLR 171 at 334 [470].

265 See *Unions NSW v New South Wales* (2019) 264 CLR 595 at 650 [151], fn 230.

266 *McCloy v New South Wales* (2015) 257 CLR 178 at 201 [24]; *Brown v Tasmania* (2017) 261 CLR 328 at 370 [131]; *Unions NSW v New South Wales* (2019) 264 CLR 595 at 650 [151].

250 The legal exercise of assessing whether a burden on the freedom of political communication is justified should be transparent, principled, and structured. Otherwise, it could become, or could be seen to become, an exercise of weighing the burdening effect of a law against little more than a judge's idiosyncratic policy preferences. A structured proportionality approach, repeatedly employed by a majority of this Court²⁶⁷, aims to avoid such problems by assessing whether the law is justified by asking (i) whether its anticipated effects are suitable or rationally connected to its legitimate purpose; (ii) whether there were alternative, "reasonably necessary", means of achieving the same object but with a less restrictive effect upon the freedom of political communication; and (iii) if the anticipated effects are suitable and reasonably necessary, whether they are adequate in the balance between the purpose to be achieved by the law and the extent of the burden imposed on the freedom.

251 It has never been satisfactorily explained why, without any room for extra-judicial policy preferences, a law that fails one of these three criteria for structured proportionality, when they are properly applied, would be consistent with the implied freedom of political communication. Nor has it ever been explained why the implied freedom should invalidate a law that is suitable, reasonably necessary to achieve its legitimate purpose and adequate in the balance. The lack of any acceptable answer to that challenge demonstrates the utility of an analysis based on structured proportionality.

252 The plaintiffs accepted that the purposes of ss 11 and 12 of the *Surveillance Devices Act*, read with s 8, are legitimate and that the provisions are suitable and rationally connected with those purposes. The two criteria upon which the plaintiffs required the State of New South Wales to justify the burden were whether the provisions are reasonably necessary and adequate in the balance.

"Reasonable necessity"

253 In *LibertyWorks Inc v The Commonwealth*²⁶⁸, I said that the test of reasonable necessity "remains capable of further development and refinement, including the manner in which it applies to different categories of case". Part of the difficulty is the label. If necessity is understood in the ordinary sense of "unavoidable", "compelled", or "indispensable", then the test for reasonable necessity is an oxymoron. Either a choice by Parliament is unavoidable or it is not. It cannot be "reasonably" unavoidable. The test of "reasonable necessity" is really

²⁶⁷ *McCloy v New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards* (2019) 267 CLR 171; *Unions NSW v New South Wales* (2019) 264 CLR 595; *Comcare v Banerji* (2019) 267 CLR 373; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490; 391 ALR 188.

²⁶⁸ (2021) 95 ALJR 490 at 536 [202]; 391 ALR 188 at 242-243.

one of reasonable choice, with recognition of the wide latitude of choice that must be afforded to Parliament in a system of representative democracy. Hence, an alternative choice that imposes a lesser burden on the freedom of political communication must be "obvious" or "compelling" such that it must be clearly expected to achieve the same purposes, to at least the same extent, and to do so with a significantly lesser burden²⁶⁹.

254 Where the burden on political communication is not great in either its depth or breadth²⁷⁰ it will be easier to justify, as reasonably necessary, the means chosen by Parliament amongst the various alternative policy choices²⁷¹. The smaller the burden on the freedom of political communication, the less likely it will be that an alternative would impose a significantly lesser burden.

255 In the relevant application of ss 11 and 12 of the *Surveillance Devices Act*, read with s 8, the burden on the implied freedom of political communication is neither deep nor wide. It is not deep because the only political communication that it prohibits concerns records or reports about lawful activities obtained exclusively as a result of trespass. It is not broad because it extends only to the communication or publication by parties to a trespass contrary to s 8 of the *Surveillance Devices Act*. Indeed, the Attorney-General for the State of Western Australia even submitted that the constitutional freedom of political communication should not extend at all to "the product of unlawful activity". Although that submission overreaches because the general law does not prohibit trespassers or those who are complicit in the trespass from publishing or communicating non-confidential information, the Attorney-General is correct to the extent that, in some circumstances, equity can respond by injunction against the trespasser to restrain or undo the continuing effects of a trespass²⁷².

269 See *Monis v The Queen* (2013) 249 CLR 92 at 214 [347]; *Tajjour v New South Wales* (2014) 254 CLR 508 at 550 [36]; *McCloy v New South Wales* (2015) 257 CLR 178 at 211 [58], 217 [81], 270 [258], 285-286 [328]; *Brown v Tasmania* (2017) 261 CLR 328 at 371-372 [139], 418-419 [282]; *Clubb v Edwards* (2019) 267 CLR 171 at 186 [6], 262 [263], 269-270 [277], 337-338 [478]-[480]; *Comcare v Banerji* (2019) 267 CLR 373 at 401 [35], 452-453 [194]; *Palmer v Western Australia* (2021) 95 ALJR 229 at 286 [271]; 388 ALR 180 at 249; *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 509 [78], 536 [202]; 391 ALR 188 at 207, 243.

270 *Clubb v Edwards* (2019) 267 CLR 171 at 337-338 [480].

271 *Clubb v Edwards* (2019) 267 CLR 171 at 199 [64].

272 *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 523 [68], 539 [150], 549 [196], 559-562 [248]-[260]; 376 ALR 575 at 592, 613, 626, 640-644.

256 The plaintiffs pointed to "alternative models" in laws of Victoria²⁷³, the Northern Territory²⁷⁴, South Australia²⁷⁵, Western Australia²⁷⁶, and Queensland²⁷⁷. None of those laws are obvious and compelling alternatives to ss 8, 11 and 12 of the *Surveillance Devices Act* which could be clearly expected to achieve the same purposes, to at least the same extent, and to do so with a significantly lesser burden.

257 In some respects, although not in others, the alternative models impose a burden on political communication that is deeper than that imposed by ss 8, 11 and 12 of the *Surveillance Devices Act*. For instance, the alternative models that are concerned with optical surveillance of activities all prohibit obtaining or publishing a record or report of a "private activity" from an optical surveillance device even in circumstances where the record or report was obtained lawfully²⁷⁸.

258 More fundamentally, the alternative models might not be expected to achieve the purposes of the protection of privacy and dignity and the protection of property rights to the same degree as the *Surveillance Devices Act*. The alternative models, to different degrees, permit exceptions to the offence including, in broad terms, where the communication or publication is: (i) to a media organisation, or by a media organisation and in the public interest, and the device was used in the public interest²⁷⁹; (ii) no more than is reasonably necessary in the public interest²⁸⁰; or (iii) authorised by a court order based on public interest grounds and no more

273 *Surveillance Devices Act 1999* (Vic).

274 *Surveillance Devices Act 2007* (NT).

275 *Surveillance Devices Act 2016* (SA).

276 *Surveillance Devices Act 1998* (WA).

277 *Invasion of Privacy Act 1971* (Qld).

278 *Surveillance Devices Act 1999* (Vic), ss 7(1), 11(1) read with s 3(1) (definition of "private activity"); *Surveillance Devices Act 2007* (NT), ss 12(1), 15(1) read with s 4 (definition of "private activity"); *Surveillance Devices Act 2016* (SA), ss 5(1), 12(1) read with s 3(1) (definition of "private activity"); *Surveillance Devices Act 1998* (WA), ss 6(1), 9(1) read with s 3(1) (definition of "private activity").

279 *Surveillance Devices Act 2016* (SA), s 10(2).

280 *Surveillance Devices Act 1999* (Vic), s 11(2)(b)(i); *Surveillance Devices Act 2007* (NT), s 15(2)(b)(i).

than is reasonably necessary in the public interest²⁸¹, where the installation or use of the device was not unlawful²⁸².

259 In each case, the exceptions in the alternative models might be expected to detract from the achievement of the legislative purposes of the protection of privacy and dignity and the protection of property rights. In *Kadir v The Queen*²⁸³, this Court said that "[t]he undesirability of admitting evidence obtained in consequence of the deliberate unlawful conduct of a private 'activist' entity is the effect of curial approval, or even encouragement, of vigilantism". One unstated premise of ss 11 and 12 of the *Surveillance Devices Act* is that the communication and publication of information obtained in breach of s 8 will be easier to detect than conduct in breach of the primary prohibition upon installation and use of an optical surveillance device by a trespasser. Thus, as Rehnquist CJ said in the Supreme Court of the United States in his dissent in *Bartnicki v Vopper*²⁸⁴, "Congress and the overwhelming majority of States reasonably have concluded that sanctioning the knowing disclosure of illegally intercepted communications will deter the initial interception itself, a crime which is extremely difficult to detect".

260 Perhaps most fundamentally, the purposes of the alternative models are not the same as those of the *Surveillance Devices Act*. For instance, there is no mention of privacy in the general objects clause in the Victorian or Northern Territory legislation²⁸⁵ and the Queensland legislation is concerned with the recording of conversations by listening devices and not with the recording of activities by optical surveillance devices²⁸⁶.

261 Ultimately, the alternative models do little more than illustrate the existence of a range of different legislative choices available in a representative democracy to implement different, although perhaps related, policy goals.

Adequacy in the balance

262 In the absence of any constitutional restriction, it would be open to Parliament to weigh in the balance the protection of dignity, privacy, and property

281 *Surveillance Devices Act 1998* (WA), ss 9(2)(a)(viii), 9(3)(a)(i), 31(1).

282 eg *Surveillance Devices Act 1998* (WA), s 25.

283 (2020) 267 CLR 109 at 137 [48].

284 (2001) 532 US 514 at 549.

285 *Surveillance Devices Act 1999* (Vic), s 1; *Surveillance Devices Act 2007* (NT), s 3.

286 *Invasion of Privacy Act 1971* (Qld).

rights (including security of one's home), on the one hand, with freedom of political communication, on the other. The conclusion that it is not adequate in the balance for Parliament to reach a "reasonably necessary" outcome that might favour dignity, privacy, and security of property is to conclude that the small, incremental burden upon the implied freedom of political communication in the relevant circumstances is a constitutional trump card over dignity, privacy, and security of property. In a representative democracy without a Bill of Rights, that is a large claim.

263 Although a person's right to the peaceful possession of property should no longer be properly treated as being more fundamental than rights to bodily integrity or liberty²⁸⁷, it remains a right of great importance. It would diminish the respect which the law affords to dignity, privacy, and the security of property to conclude that the *Surveillance Devices Act* is invalid in its application to trespassers, and those complicit in the trespass, who seek to take advantage of their trespass by communicating or publishing a record or report of lawful activities. And that diminished respect would be for the marginal benefit of eliminating only a small incursion upon the implied freedom of political communication, involving a narrow incremental development of the existing general law.

264 The reasons above would be sufficient to conclude that ss 11 and 12 of the *Surveillance Devices Act*, read with s 8, are adequate in the balance in their relevant application. But the balance is not even truly between the values of dignity, privacy, and security of property, on the one hand, and freedom of political communication, on the other. In the relevant application to trespassers and those complicit in the trespass, the protection of dignity, privacy, and security of property is itself a protection of freedom of political communication. An assault on the one can be an assault on the other. As Gageler J said in *Smethurst v Commissioner of the Australian Federal Police*²⁸⁸, paraphrasing the State Trials report of Lord Camden's speech in *Entick v Carrington*²⁸⁹, there is a "link between protection of personal property and protection of freedom of thought and political expression". Thus, as Kirby J said in *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd*²⁹⁰, the Tasmanian legislation empowering the issue of an injunction in the circumstances of that case²⁹¹ was not merely compatible with

²⁸⁷ *Smethurst v Commissioner of the Australian Federal Police* (2020) 94 ALJR 502 at 557 [239]; 376 ALR 575 at 637.

²⁸⁸ (2020) 94 ALJR 502 at 534 [124]; 376 ALR 575 at 606.

²⁸⁹ (1765) 19 St Tr 1029.

²⁹⁰ (2001) 208 CLR 199 at 282 [200].

²⁹¹ *Supreme Court Civil Procedure Act 1932* (Tas), s 11(12).

the representative democracy created by the *Constitution*, it was "a feature of that democracy".

Non-human animal cruelty and the answers to the questions in the special case

265 For many people, the motivations of the plaintiffs, which include elimination of cruelty to non-human animals, might be laudable. And one of the most compelling ways in which the plaintiffs can agitate for policy and social change in this area is publicising the type of shocking images exhibited in this case. But no matter how worthy that ultimate goal might be, it is not open in a representative democracy for this Court to deny the Parliament of New South Wales the ability to sanction trespassers and those complicit in the trespass in order to protect dignity, privacy, and security of property where the Parliament does so at the cost of only a small incursion upon freedom of political communication.

266 Further, the answers given to the questions concerning freedom of political communication that are before this Court are neutral in their effect on protection of non-human animals. A search for truth in the marketplace of ideas cannot censor communication according to its content. A strong protection of freedom of speech has therefore been used in some cases in the United States with an effect that might positively erode the protection of non-human animals. In *United States v Stevens*²⁹², a majority of the Supreme Court of the United States considered laws that criminalised the commercial creation, sale, or possession of visual or auditory depictions "in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed". The legislative background included evidence of a market for "crush videos" which depicted animals being crushed to death²⁹³. Despite the abhorrent nature of the content, the law was presumptively invalid because it proscribed speech based on content²⁹⁴. As Alito J said in dissent, the Supreme Court struck down "in its entirety a valuable statute ... that was enacted not to suppress speech, but to prevent horrific acts of animal cruelty"²⁹⁵. On the other hand, it has been suggested that the "same right to free speech would also prevent

292 (2010) 559 US 460. Cf *United States v Richards* (2014) 755 F 3d 269, from which an application for certiorari was refused: *Richards v United States* (2015) 135 S Ct 1547.

293 (2010) 559 US 460 at 465-466.

294 (2010) 559 US 460 at 468.

295 (2010) 559 US 460 at 482.

[Congress] banning depictions of cruelty to animals by hunters or food producers"²⁹⁶.

267 In a representative democracy, the best protection for non-human animals against cruelty is not the implied freedom of political communication. Putting to one side the prospect of any significant development of the common law, the best protection for non-human animals must come from Parliament. In New South Wales, one step has been the *Prevention of Cruelty to Animals Act 1979* (NSW). That Act includes powers for inspectors to enter land without consent of the occupier in circumstances including the examination of an animal based on a suspicion, on reasonable grounds, that a person has committed an act of cruelty upon an animal, which includes unreasonable infliction of pain²⁹⁷.

268 The questions in the special case, formulated by reference to accurate language, should be answered as follows:

Question 1. Does s 11 of the *Surveillance Devices Act* impermissibly burden the implied freedom of political communication?

Answer: Section 11 does not impermissibly burden the implied freedom of political communication in its application to the communication or publication by a person of a record or report of the carrying on of a lawful activity, at least where the person was complicit in the record or report being obtained exclusively by breach of s 8 of the *Surveillance Devices Act*. It is unnecessary to determine whether s 11 burdens the implied freedom of political communication in other applications.

Question 2. If "yes" to Question 1, is s 11 of the *Surveillance Devices Act* [able to be partially disapplied] in respect of its operation upon political communication pursuant to s 31(2) of the *Interpretation Act 1987* (NSW)?

Answer: If s 11 were invalid in some of its operations, it could be partially disapplied to the extent of that invalidity. Otherwise, this question is unnecessary to answer.

Question 3. Does s 12 of the *Surveillance Devices Act* impermissibly burden the implied freedom of political communication?

Answer: Section 12 does not impermissibly burden the implied freedom of political communication in its application to the possession by a person of a record

²⁹⁶ Barnett and Gans, *Guilty Pigs* (2022) at 274.

²⁹⁷ *Prevention of Cruelty to Animals Act 1979* (NSW), s 24E(1), s 24I(a) read with ss 5(1) and 4(2).

of the carrying on of a lawful activity, at least where the person was complicit in the record being obtained exclusively by breach of s 8 of the *Surveillance Devices Act*. It is unnecessary to determine whether s 12 burdens the implied freedom of political communication in other applications.

Question 4. If "yes" to Question 3, is s 12 of the *Surveillance Devices Act* [able to be partially disapplied] in respect of its operation upon political communication pursuant to s 31(2) of the *Interpretation Act 1987* (NSW)?

Answer: If s 12 were invalid in some of its operations, it could be partially disapplied to the extent of that invalidity. Otherwise, this question is unnecessary to answer.

Question 5. Who should pay costs?

Answer: The plaintiffs should pay the defendant's costs.

269 STEWARD J. I respectfully and generally agree with the reasons of Kiefel CJ and Keane J as well as those of Edelman J. In the circumstances of this case, ss 11 and 12 of the *Surveillance Devices Act 2007* (NSW) are valid laws. I agree with the answers proposed by Edelman J to the questions posed by the Amended Special Case.

270 In this case, and on the assumption that the implied freedom of political communication may fetter the legislative power of a State²⁹⁸, the justification for ss 11 and 12 is also buttressed by the presence of legislation in New South Wales designed to protect animals from cruelty, such as the *Prevention of Cruelty to Animals Act 1979* (NSW) ("the POCA Act") and the *Companion Animals Act 1998* (NSW). Relevantly, inspectors in New South Wales have the power, in defined circumstances, to enter land to prevent cruelty to animals (s 24E of the POCA Act), to seek search warrants to enter and search land (s 24F of the POCA Act), to examine an animal (s 24I of the POCA Act), and to give a person a written notice requiring that person to take specified action in relation to an affected animal to avoid any further contravention (s 24N of the POCA Act). That legislation provides context legitimately to be considered in assessing the legislative choices reflected in ss 11 and 12.

298 cf Twomey, "The Application of the Implied Freedom of Political Communication to State Electoral Funding Laws" (2012) 35 *University of New South Wales Law Journal* 625 at 626. See also *LibertyWorks Inc v The Commonwealth* (2021) 95 ALJR 490 at 554-556 [298]-[304]; 391 ALR 188 at 267-269.

271 GLEESON J. I respectfully agree with the principles stated by Kiefel CJ and Keane J concerning the requirement for justification of a statutory provision having the effect of burdening the implied freedom of political communication, and the structured proportionality analysis by which such a statutory provision may be justified.

272 Otherwise, I agree with Gageler J as to the scope of the question for judicial determination. The general principle, stated in *Knight v Victoria*²⁹⁹, is that a party who seeks to challenge the constitutional validity of a statutory provision will generally be confined to advancing grounds which bear upon the provision's validity "in its application to that party"³⁰⁰. The general principle confines a party to challenging provisions that have some operation in relation to that party³⁰¹, and to grounds of challenge that are not merely hypothetical³⁰². Complicity in any contravention of s 8 of the *Surveillance Devices Act 2007* (NSW) that led to a contravention of ss 11 and 12 is not an element of the offences stated in ss 11 and 12. For the reasons given by Gageler J, Farm Transparency's past complicity in a contravention of s 8 does not provide a basis for confining the enquiry in this special case to whether the constraints purportedly imposed by ss 11 and 12 are valid in the narrow circumstance that the person said to contravene either of those provisions was complicit in the contravention of s 8. On the facts of Farm Transparency's pattern of activities presented in the special case, the question that falls for determination is a broader one. It is whether ss 11 and 12 validly operate to prohibit the possession, communication and publication of matter generated in contravention of s 8.

273 Gageler J's reasons sufficiently explain why the prohibitions in ss 11 and 12 infringe the constitutional guarantee of political communication by lacking an adequate balance between the benefit sought to be achieved by the provisions and their adverse effect on the implied freedom. I agree with his Honour as to the proper construction of ss 11 and 12 consequent upon the conclusion that the provisions infringe the constitutional guarantee. Accordingly, I agree with his Honour's proposed answers to the questions in the special case.

299 (2017) 261 CLR 306.

300 *Knight* (2017) 261 CLR 306 at 325 [33].

301 *The Real Estate Institute of NSW v Blair* (1946) 73 CLR 213 at 227.

302 cf *Knight* (2017) 261 CLR 306 at 324-325 [31]-[33].

